STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Ronayne Krause, P.J., and Borrello and Riordan, JJ

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.
_____/

Supreme Court No. 146440

Court of Appeals No. 306618

Court of Claims No. 11-33-MT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF ON APPEAL OF APPELLEE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN

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STATEMENT OF JURISDICTION

Defendant-Appellee Michigan Department of Treasury concurs with Plaintiff-Appellant IBM's statement of jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The State of Michigan enacted the Multistate Tax Compact, MCL 205.581 into State law effective 1970. The Compact authorizes persons subject to an income tax to elect to apportion such income either according to a three-factor apportionment formula set forth in the Compact or apportion income pursuant to the laws of the State. Effective January 1, 2008, persons who engaged in business activities in this State were subject to tax under the Michigan Business Tax Act. MCL 208.1101 *et seq.* The Business Tax Act contains a single-sales-factor apportionment formula that is mandatorily applicable to the Act's business income-tax component and its modified-gross-receipts component. Under those primary facts, this Court directed the parties to address the following four issues, which Treasury addresses in the following reordered format:

1. Whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state.

Appellant's answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.

2. Whether §1301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact.

Appellant's answer:	No.
Appellee's answer:	Yes, but only as an alternative position.
Trial court's answer:	Did not answer.
Court of Appeals' answer:	Yes.

3. Whether IBM could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether IBM was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq.*

Appellant's answer:	Yes. IBM is entitled to use the Compact's apportionment formula.
Appellee's answer:	No. IBM was required to use the Business Tax Act sales-factor formula.
Trial court's answer:	No. IBM was required to use the Business Tax Act sales-factor formula.
Court of Appeals' answer:	No. IBM was required to use the Business Tax Act sales-factor formula.

4. Whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact.

Appellant's answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	Did not answer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 9, § 2 of the Michigan Constitution states:

> The power of taxation shall never be surrendered, suspended *or contracted* away.

Article III, Elements of Income Tax Laws, Taxpayer Option, State and Local Taxes of the Multistate Tax Compact, MCL 205.581, as amended, states in part:

> (1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV except that beginning January 1, 2011 any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV. This election for any tax year may be made in all party states or subdivisions thereof or in any one or more of the party states or subdivisions thereof without reference to the election made in the others.

Section 203, of the Michigan Business Tax Act, MCL 208.1203 provides in part:

> (1) Except as otherwise provided in this act, there is levied and imposed a modified gross receipts tax on every taxpayer with nexus as determined under section 200. The modified gross receipts tax is imposed on the modified gross receipts tax base, after allocation or apportionment to this state at a rate of 0.80%.
>
> (2) The tax levied and imposed under this section is upon the privilege of doing business and not upon income or property.
>
> (3) The modified gross receipts tax base means a taxpayer's gross receipts subject to the adjustment in subsection (6), if applicable, less purchases from other firms before apportionment under this act.

Section 1301, of the Michigan Business Tax Act MCL 208.1301 provides in part:

> (1) Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter.

(2) Each tax base of a taxpayer whose business activities are confined solely to this state shall be allocated to this state. Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303.

Section 303, of the Michigan Business Tax Act, MCL 208.1303 provides in part:

(1) Except as otherwise provided in subsection (2) and section 311, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year and the denominator of which is the total sales of the taxpayer everywhere during the tax year.

INTRODUCTION

As a matter of Michigan law, the Multistate Tax Compact is only a State law, not a binding contract, regardless of how other states' courts may characterize the Compact under those states' laws. The Compact is nothing more than a model law that Michigan is free to adopt, adapt, or reject, just like the Uniform Commercial Code or any other model law the Legislature adopts in whole or in part.

It is true this model legislation has the word "compact" in its title and text, and that state legislatures adopting (or adapting) the model do so with the understanding that other states may be taking similar action. But those truths do not change the law's *character* any more than calling the UCC a commercial "compact" and adopting the UCC at the same time as other states would change the UCC's character as state law, law that the Michigan Legislature is free to change.

The notion that tax statutes can be modified and repealed has particular force in light of article 9, § 2 of Michigan's Constitution, which prohibits the State's ability to contract away the "power of taxation," as this Court recently explained:

> [F]or a statute to form the basis of a contract, the statutory language "must be 'plain and susceptible *of no other reasonable construction*' than that the Legislature intended to be bound to a contract." . . . [In the absence of language] that the Legislature intended to be contractually bound by [the relevant] provisions forever, and because Const 1963, art 9, § 2 prohibits the Legislature from contracting away its taxing authority, [tax laws] do not create contractual rights that cannot be altered by the Legislature. Indeed, it is "well established that a taxpayer does not have a vested right in a tax statute or in the continuance of any tax law." [*In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA* 38, 490 Mich 295; 806 NW2d 683 (2011) (numerous quotations and citations omitted, emphasis added).]

Nothing in the Michigan statutory provisions implementing the Compact suggests a legislative intent that the provisions cannot be amended. As a result, and

consistent with article 9, § 2, the Compact is only statutory law that the Michigan Legislature is free to amend, modify, and repeal at any time.

As an ordinary State law, the Compact is also subject to the normal rules of statutory construction in its relation with the Michigan Business Tax Act. Under the normal rules of statutory construction, the newer, more specific Michigan Business Tax Act controls over the older, general Compact. The Compact in its subordinate posture is easily harmonized into the Business Tax Act's structure through the latter Act's apportionment-relief provision.

Alternatively, if the Compact cannot be harmonized into the Business Tax Act, then the only legitimate interpretation is that the Business Tax Act repealed the Compact's election provision by implication. Accordingly, only the Act's sales-factor apportionment formula may be used to apportion the different tax components of the Act.

No matter the Compact's status, the modified-gross-receipts-tax component of the Business Tax Act is not an income tax. In the broad context, it is extremely doubtful, if not unconstitutional, that the Legislature enacted two income taxes on the same income and within the same tax act. The Business Tax Act also contains a business-income-tax component which Treasury has admitted is an income tax. More specifically, a review of the language of the modified-gross-receipts-tax component and it method of calculation clearly establishes that it is not an income tax.

COUNTER-STATEMENT OF FACTS

IBM's refund claim

IBM filed its Michigan Business Tax Annual Return for the 2008 tax year on December 23, 2009. On line 10 of its return, where the form provides for an "Apportionment Calculation" that serves as the basis for calculating the amount of a taxpayer's tax base that is to be apportioned to the State of Michigan for the several components of the Act, in lieu of completing the instructed calculations, IBM typewrote "SEE ATTACHED ELECTION." (Appellant's Br on Appeal, Attach C.) Along with its return, IBM filed a "statement" entitled "ELECTION TO USE MTC THREE FACTOR APPORTIONMENT." *Id.* The statement indicated that IBM was "electing to apportion its business income tax base and modified gross receipts tax base on th[e] return using a three factor apportionment percentage" from the Compact under MCL 205.581.

According to IBM, its election reduced the allocation of its gross receipts to the State of Michigan from 2.6179% of its overall modified-gross-receipts tax base to only 1.6127%. IBM thus claimed that it had significantly overpaid its taxes for the 2008 tax year. IBM requested a refund in the amount of $5,955,218—just under half of the $12.7 million it had paid in estimated payments and other prior payments. Of the refund requested, more than 80% related to IBM's assessed liability under the modified-gross-receipts-tax component of the Act.[1]

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[1] IBM requested a refund of $5.95 million and received a refund of $1.25 million. Of the remaining $4.7 million requested refund that was denied, approximately $3.8 million—or roughly 81%—was due to IBM's liability under the modified-gross-receipts-tax component.

Treasury responded to IBM's return with a Notice of Refund Adjustment dated December 17, 2010, making several adjustments to IBM's return. (Appellant's Br on Appeal, Attach D.) Treasury's primary adjustments were to provide IBM with a credit for business losses that it had not carried forward from the previous year, resulting in a refund of $1,253,609, and to adjust IBM's apportionment calculation to reflect the mandatory application of the Act's sales-factor apportionment method. *Id.* With regard to apportionment, Treasury's Notice indicated:

> Apportion percentage adjusted. Under Chapter 3 of the Michigan Business Tax [i.e. MCL 208.1301], if the business activities of a taxpayer are subject to tax within and without the state, each tax base *must be apportioned* on the formula of sales in Michigan over sales everywhere (MCL 208.1115). [*Id.* (emphasis supplied).]

Based on this adjustment applying the Act's mandatory sales-factor, Treasury denied the remainder of IBM's request for a refund. The Notice further provided that if IBM disagreed with Treasury's decision, IBM could file suit with the Court of Claims within 90 days. This litigation followed.

PROCEEDINGS BELOW

The Court of Claims grants Treasury summary disposition.

IBM filed suit in the Court of Claims on March 15, 2011. IBM's complaint asserted that the business-income-tax component of the Act, the modified-gross-receipts-tax component of the Business Tax Act, and the Act as a whole imposed income taxes subject to the election provisions of the Compact. IBM averred that it had made a valid election under Article III, § 1 of the Compact and that "[t]he provisions of MCL 208.1309 [i.e., the Act election provision] may not be applied . . . to override Petitioner's election . . ." (Appellant's App, pp 18a-19a, 26a-27a, and 32a-33a.) IBM's three-count complaint asked the Court of Claims to uphold IBM's election, to recompute IBM's business-income-tax component, its modified-gross-receipts component, and total Act liability, and to provide the refund it had claimed in its return, together with costs and interest.

IBM filed a motion for summary disposition under MCR 2.116(C)(10) on June 16, 2011. Treasury responded and requested judgment under MCR 2.116(I)(2).

The Court of Claims denied IBM's motion for summary disposition and granted summary disposition in Treasury's favor under MCR 2.116(I)(2) based on the Business Tax Act's express language mandating use of the Act's formula. (Appellant's App p 31a.) The Court rationalized that the Legislature knew of the Compact when it enacted the Business Tax Act, yet chose to preclude the Compact election by mandating the Act's formula. (*Id.*, at p 32a.) Bolstering its conclusion, the Court relied on rules of statutory construction to reject IBM's position because it rendered sections of the Business Tax Act meaningless. (*Id.*, p 33a.)

IBM moved for reconsideration, which the Court of Claims denied in an order dated September 23, 2011. IBM then filed its appeal to the Court of Appeals on October 23, 2011.

The Court of Appeals affirms.

The Court of Appeals affirmed the Court of Claims decision in Treasury's favor, but based on different reasoning. The Court concluded that the Business Tax Act expressly mandated use of this Act's sales-factor apportionment formula and that presented a facial conflict with the Compact election. (*Id.*, p 39a.) Believing that there was no way to harmonize the two statutes, and recognizing that implied repeals are disfavored, the Court felt it had no choice but to find the Compact repealed by the later enacted Business Tax Act. (*Id.*, p 40a.)

Further, the Court rejected IBM's argument that the Compact was a binding contract. It found no language of the type this Court has stated is necessary to transform an ordinary statute into an irrevocable statutory contract. (*Id.*)

The Court of Appeals did not decide whether the modified-gross-receipts-tax component was an income tax within the meaning of the Compact. The Court felt that because the Business Tax Act contained an income tax component that, as admitted by Treasury, was amenable to the Compact's election, it simply could not decide that the Business Tax Act**Error! Bookmark not defined.** was not an income tax. (*Id.*, p 41a.)

Judge Riordan concurred, concluding that while the Business Tax Act mandated use of its formula, the Compact could be harmonized in a subordinate posture through the Business Tax Act's apportionment-relief provision. (*Id.*, p 43a.)

ARGUMENT

I. The Compact is not a statutory contract.

A. Standard of review

This Court reviews *de novo* the Court of Claim's Order that granted Treasury's motion for summary disposition. *Studier v Michigan Public Schools' Employee Retirement Board*, 472 Mich 642, 649; 698 NW2d 350 (2005). Similarly, this Court reviews constitutional issues and issues of statutory construction *de novo*. *Id.*

B. Analysis

There is nothing on the face of the Compact that suggests the Legislature in 1969 intended to contract with other states who also enacted the Compact into law such that successive legislatures had no power to amend Michigan tax law. Certainly the Legislature in 1969 understood that it was enacting the Compact in broad concert with other States. But the determination of whether the Compact is a binding contract doesn't turn on that fact. States enact uniform laws and model laws all of the time with no contractual strings attached. What matters is whether the Legislature used words clearly expressing an intent to contract. No such words are present in the Compact.

1. The Compact is not federal law binding all States.

In *United States Steel Corp v Multistate Tax Commission*, 434 US 452 (1978), the United States Supreme Court held that the Compact was not the type of compact necessitating congressional approval under the Compact Clause of the United States Constitution, US Const, art I, §10, cl 3. The Supreme Court's holding firmly

established that only compacts between states that infringe on the political power of the United States need congressional adoption to be valid. In reaching this conclusion as to the Compact, the United States Supreme Court never decided that the Compact is a binding interstate compact.

Because the Compact was not adopted by Congress, it has not become federal law under the Compact Clause, and through the Supremacy Clause of the United States Constitution, binding on signatory States. *Corr v Metro Washington Airports Auth*, 800 F Supp 2nd 743, 758-759 (2011), citing *New Jersey v New York*, 523 US 767, 810 (1998); *Bush v Muncy*, 659 F 2d 402 (CA4, 1981); *West Virginia ex rel Dyer v Sims*, 341 US 22, 33 (1951). Similarly, lack of congressional approval means that interpretation of the Compact presents only State law questions. *Id.*

2. Analyzed as a State law question, the Compact does not have the attributes of a binding contract.

a. The distinctive attribute of a binding compact is the ceding of state sovereignty to other states or a new multistate agency.

Compacts are different from model laws, uniform laws, or reciprocal laws. Uniform laws and model laws are developed as "guideline legislation that states can borrow from *or adapt* to suit their individual needs and conditions." Broun on Compacts, p 15 (Appellant's Attach CC, pp 12-13 (emphasis added).) Uniform laws represent the culmination of a group study of the various laws of several states to discern the areas which should be uniform between states. *Id.* Although states are urged to adopt these proposals verbatim, there is no requirement that occur and so states modify them to fit specific needs. Consequently, uniform laws are neither

contracts that bind several states who enact them nor enforceable against them. *Id.*, Attach CC at 13. Uniform laws do not limit the ability of states to amend or modify them. And although states understand they are enacting such uniform laws in concert with other states there is no consequence if a state chooses not to. *Id.*

Although interstate compacts that rise to the level of a binding contract include the uniformity characteristic associated with uniform laws, their common attribute is the ceding of each individual state's sovereignty to other states or to an agency created by the compact. *Id.* "It is this ceding of sovereignty that is the vital consideration in determining whether an interstate agreement rises to the level of an enforceable interstate compact." *Id.*, Attach CC at 14.

The United States Supreme Court agrees that the ceding of state sovereignty to "a joint organization or body [that] has been established to regulate" the area of the subject matter of the compact is a classic indicia of a compact creating a contract. *Northeast Bancorp Inc v Bd of Governors*, 472 US 159, 175 (1985). Other classic indicia identified by the Supreme Court include conditions on one state being dependent on action taken by another state, removal of the right for any State to unilaterally modify or repeal the law, and that the statute requires a reciprocation of regional jurisdiction. *Id.*

b. A statutory contract also requires unmistakable language to that effect.

As long ago as 1862, the United States Supreme Court was concerned with the implications on state sovereignty based on a conclusion that a given state action constituted a binding contract. To address that concern, the Court formulated the "so-

called 'unmistakability doctrine.'" *Id.*, Attach CC at p15. In *Jefferson Branch Bank v Skelly*, 66 US 436, 446 (1862), the Supreme Court first stated the principle of the unmistakability doctrine: "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."

The unmistakability doctrine over time included an additional element—the reserved powers doctrine. Broun on Compacts, p 20. (Appellant's Attach CC, p 15.) The reserved powers doctrine stated that there are certain state powers that could not be contracted away, and included the adoption of the canon of construction that whether a public grant was a contract would be strictly construed in favor of the State. *United States v Winstar Corp*, 518 US 839, 874-875 (1996) (plurality opinion), citing *West River Bridge Co v Dix*, 47 US 507 (1848); *Proprietors of Charles River Bridge v Proprietors of Warren Bridge*, 11 Pet 420 (1837); *The Delaware Railroad Tax*, 85 US 206 (1874).

In this vein, the Supreme Court has gone so far as to note where a compact is silent or ambiguous regarding a state ceding sovereignty, courts should apply the "well-established principle that States do not easily cede their sovereign powers." *Tarrant Regional Water District v Herrman*, 596 US ____; 133 S Ct 2120, 2132 (2013). And any inference drawn from such silence or ambiguity is in favor of finding a state did not cede its sovereignty. *Id.* The reason is that states "rarely relinquish their sovereign powers so when they do the Court expects a clear indication of such" occurrence, and thus the "better understanding of silence is that the parties drafted the Compact with this legal background in mind." *Id.*, at 2133.

c. The State of Michigan's comparative unmistakability doctrine

This Court has formulated a similar analysis to determine whether a law is also a contract. *Studier v Mich Pub Sch Ret Emples Bd,* 472 Mich 642, 660-661; 698 NW2d 350 (2005), citing *United States v Winstar Corp, supra;* and *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich 295; 806 NW2d 683 (2011). In *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich 295; 806 NW2d 683 (2011), the Court stated that a "fundamental principle of the jurisprudence of the United States and this state is that one legislature cannot bind the power of a successive legislature." *Id.* at 319 (quoting *Studier* 472 Mich at 660-661). Accordingly, there is a "*strong presumption that statutes do not create contractual rights.*" *Id.* (emphasis added). Thus:

> [F]or a statute to form the basis of a contract, the statutory language "must be 'plain and susceptible of no other reasonable construction' than that the Legislature intended to be bound by contract." That is, "before a statute, *particularly one relating to taxation*, should be held to be irrepealable or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no reason for doubt. Otherwise the intent is not plainly expressed." [*Id.* at 320-321 (quotations omitted, emphasis added).]

Where this expression is absent "courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id.* Indeed, under article 9, § 2's prohibiting the State from contracting away its taxing power, it is questionable whether the Legislature even has the *authority* to create a statutory tax contract absent an amendment to Michigan's Constitution.

Here, it is undisputed that the Compact blacks the words this Court typically associates with a contractual relationship, such as "'contract,' 'covenant,' or 'vested

rights.'" *Id.* at 321. "Had the Legislature intended to surrender its legislative powers through the creation of contractual rights, it would have expressly done so by employing such terms." *Id.*at 322 (citing *Studier*, 472 Mich at 663-664).

d. The Compact's history also discloses that it was never meant to be a multi-state contract.

The Compact does not purport to cede Michigan's sovereignty with respect to taxation. The Compact's history confirms that was not the case. One of the earliest proponents for the Multistate Tax Commission and the Compact was a former Assistant Attorney General for the State of Michigan, William Dexter. He shepherded the drafting of the Compact and litigated both the Commission's and Compact's vitality across the country, including before the United States Supreme Court in *United States Steel Corp v Multistate Tax Commission.* (Appellee's Ex 1, 18 State Tax Notes 1545 (May 1, 2000), "*Remembrance of a Great Lawyer: William David Dexter*" by Gene Corrigan, first Executive Director of the Multistate Tax Commission.) While Dexter's views on the Compact are obviously not binding, the brief he submitted in the *United States Steel* case as legal counsel to the Commission confirms the Compact's text.

Dexter acknowledged that the Compact**Error! Bookmark not defined.** created the Multistate Tax Commission, but the Commission was only "an advisory agency and that its work product [was] *not binding on anyone*—State or taxpayer." (Appellee's Ex 2, p 7, Multistate Tax Commission, Br of Appellees, On Appeal From the United States District Court for the Southern District of New York, 1997 WL (West Law) 189138 (U.S.) (emphasis added)). Dexter stressed that the Commission

(consisting of the individual states' tax administrators) denied that the states "surrendered to the Commission any of their powers to fix and determine the tax liabilities of any taxpayers." *Id.* at p 8. "The member states have ceded no sovereignty over tax matters to the Commission." *Id.* at p 22, and p 23, "By adoption of the Compact, each state has retained complete and absolute control over its own tax system."

Dexter pointed to Article IV, § 3, which identified the powers granted to the Commission. These powers did not have any compulsory effect on states or taxpayers, but rather these were powers that allowed the Commission to "advise and to make recommendations to the party states." *Id.* at 9. As to the Commission's authority to adopt "uniform regulations" administering various types of uniform taxes in the States, Dexter made clear that these regulations had no effect unless individual states enacted them in accordance with the respective states' laws. *Id.*, p 9.

Turning to other Compact language, Dexter acknowledged that Articles III and IV allowed interstate taxpayers options, including the election to choose the Compact's apportionment formula. But he also noted that these Articles contain the "provisions of the Uniform Division of Income for Tax Purposes Act (UDIPTA) promulgated by the National Conference of Commissioners on Uniform State Laws." *Id.*, p 8. Dexter identified these Articles and the option in Article III § 2 as "essentially uniform acts" that "could be adopted by any state independently of any compact even though it has been specifically devised for the Compact." *Id.* at 8. Similarly, he characterized Article V as a uniform act that did not confer any State power to the Commission. *Id.* Summarizing these points, he wrote:

> An examination of the provisions of the Compact thus indicates it is a package of arrangements which traditionally have been used, independently of any formal compact, to further interstate uniformity and cooperation, such as uniform or reciprocal acts. It creates a body of state tax official to make advisory recommendation with respect to statutory or administrative changes. All of these things recommended by the Commission may be put into operation only by the individual states themselves, acting either through their legislatures or their individual tax administrators. [Ex 2, p 11.]

Dexter also questioned whether the Compact was an "agreement or compact" at all. Ex 2, p 23. He observed that the label "Compact" was not controlling; states are free to join or withdraw from the Compact at will; and the Compact's operative provisions "are merely reciprocal arrangements among the party states for their mutual benefit in administering their tax laws as applied to multistate-multinational businesses." Ex 2, p 23. The Compact's "only added feature is cooperative administration of uniform state legislation which has never hinted as constituting a binding compact or agreement by the states participating in such cooperation administrative action." *Id.*

e. The United States Supreme Court adopts Mr. Dexter's characterizations of the Compact.

In *United States Steel*, the Supreme Court concurred with Dexter's views regarding the Compact and the Commission in its analysis of whether the Compact violated the Compact Clause. The Court referred to the Compact as a model law, 434 US at 456, n 5, and that the Commission acts in an advisory capacity, *Id.* at 457. Member states "retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination

of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due." *Id.*

Most significantly, the Compact does not result in "any delegation of sovereign power to the Commission," and each state is free to withdraw at any time. 434 US at 473. Given this, it should be no surprise that the Supreme Court never stated that the Compact was a binding interstate compact (and even if the Court had done so, that would not answer the independent question whether the Compact so construed would violate article 9, § 2 of Michigan's Constitution).

f. Analyzed as a matter of State law, the Compact lacks indicia of a binding contract.

As noted above, the Compact contains no express or implied language that satisfies the vital consideration for whether a uniform or model law is a contractual compact. *Northeast Bancorp*, 472 US at 175; Broun on Compacts, Appellant's Attach CC, p 14. Even IBM agrees that the *United States Steel* Court held that through the Compact the member states did not delegate their sovereign powers to the Commission. (Appellant's Br on Appeal, p 31.) Furthermore, silence on whether Michigan ceded sovereignty is construed to mean that Michigan did not do so. *Tarrant*, 133 S Ct 2120, 2132.

Similarly, nothing in the Compact grants the Commission authority to administer Michigan's tax laws or limit their reach. The Compact does not cede or limit the State's jurisdiction to tax revenues, income, gross receipts earned, value-added created, or business activities conducted, within Michigan's borders. Correspondingly, the Compact does not allow other states to expand their taxing

jurisdiction within Michigan's borders. *Tarrant*, 133 S Ct at 2133-2134 ("compacts feature language that unambiguously permits signatory States to cross each other's borders to fulfill obligations under the compacts," in addition for providing "for the terms and mechanics of how such cross-border relationships will operate, including who can assert such cross-border rights.") See also *Northeast Bancorp*, 472 US at 175 (most importantly, compact contracts typically require a reciprocation of regional jurisdiction.) Critically, there is also no express or implied language limiting a successive Michigan Legislature from amending, modifying, or repealing any portion of the Compact.

Consistent with the Compact's non-binding language, numerous states have picked and chosen portions of the Compact to implement. For example, Article IX was never implemented based on the State of California's objection to it and conditioning its continued membership on that Article's rules never being implemented. (Appellant's Attach DD, p 2 and footnote 2, MTC's 40th Anniversary—A Retrospective, Eugene Corrigan, 45 State Tax Notes p 529, August 20, 2007.) In Colorado, that State's legislature repealed Article III in 2009. (Appellee's Ex 3.) Yet, according to the Commission's website [http://www.mtc.gov/AboutStateMap.aspx], Colorado remains a Compact member in good standing with the Compact and Commission.

Buttressing these points is the Commission's amicus briefs both in the Court of Appeals in this case, and its filing in *Gillette Co v Cal Franchise Tax Bd*, 209 Cal App 4th 938; 147 Cal Rptr 3d 603 (2012). The Commission explained that the Compact members through their course of performance in migrating away from allowing the Article III, § 1 election demonstrate member states' interpretation of the Compact as

providing flexibility. Such historical unilateral action by Compact members establishes that the Compact is not a rigid binding contract that was meant by them to create enforceable contract obligations against each other. (Appellee's Ex 4.) Indeed, the party states' "conduct under the Compact" and their "'course of performance under the Compact is highly significant' evidence of [their] understanding of the Compact's terms." *Tarrant*, 133 S Ct at 2135 (quoting *Alabama v North Carolina*, 560 US at ____; 130 S Ct 2295, 2317 (2010)).

Finally, there is article 9, § 2, which forbids the Michigan Legislature from surrendering, suspending or contracting away the power of taxation. (See *Tarrant*, 133 S Ct at 2133, for the proposition that party states draft compacts with other laws and rules of construction in mind.) If the Compact, in general, and Article III, § **1Error! Bookmark not defined.**, in particular, is a binding contractual provision, then that means the Michigan Legislature unconstitutionally ceded sovereignty to tax multistate businesses, and plainly surrendered the power to tax to some other person.

Use of the general term "person" is intentional in the above sentence because it highlights another problem for anyone who argues that the Compact is a binding contract. Everyone agrees that no state through the Compact ceded sovereignty over taxation of multistate businesses to the Commission. So to whom would Michigan or any member state have ceded sovereignty to with respect to taxation of multistate businesses? Other member states, individually, or as a collective group but *not* as the Commission? To taxpayers? The obvious and correct answers are neither and to no one.

As to the former, there is no language in the Compact suggesting that fact. Plus, no other individual state is impacted by whether Michigan enacted the Compact, nor by whether Michigan enforces the Compact in Michigan. The reason is that the Compact as enacted into Michigan law fails to grant other states cross-border jurisdictional tax authority in Michigan and places no limits on Michigan's taxing authority. Similarly, no other member-states granted Michigan cross-jurisdictional tax authority within those other member states' borders.

As to the latter, it takes no citation to law to support the proposition that the Legislature cannot delegate, let alone surrender, its powers of taxation to private persons.

Lastly, the power to define, amend, modify, or repeal apportionment formulas is intimately intertwined with the power to control legislation and administrative action affecting the rate of taxation, the composition of the tax base, and the means and methods of determining tax liability. As they relate to multistate businesses, apportionment formulas ultimately determine the apportioned tax base subject to tax. That is the reason for their existence—to ensure that of the income of a multistate business, earned both within a taxing jurisdiction and outside of it, only that portion fairly attributable to the taxing jurisdiction is subject to tax. *Exxon Corp v Dep't of Revenue of Wisconsin*, 447 US 207, 219, 223 (1980). If the Legislature had bound itself by contract to grant either other states or private taxpayers the power to elect the three-factor Compact formula, then it contracted away the power of taxation in violation of Const 1963, art 9, § 2.

II. The Multistate Tax Compact is either harmonized within §1301 of the Michigan Business Tax Act, MCL 208.1301, or the Act repealed by implication Article III (1) of the Multistate Tax Compact.

A. Standard of Review

This Court reviews *de novo* reviews constitutional issues and issues of statutory construction. *Studier v Michigan Public Schools' Employee Retirement Board*, 472 Mich 642, 649; 698 NW2d 350 (2005).

B. Analysis

1. The Compact and Business Tax Act can be harmonized.

Treasury has continually argued as its primary position on this issue that implied repeal is an alternative if the two statutes cannot be harmonized. Treasury has also continually argued that the election provided for in the Compact can be harmonized into the Business Tax Act under the Act's apportionment-relief provision. MCL 208.1309. That position was taken because of two rules.

First, repeals by implication are disfavored. *City of Kalamazoo v KTS Industries*, 263 Mich App 23, 36; 687 NW2d 319 (2004) (quoting *Wayne County Prosecutor v Department of Corrections*, 451 Mich 569, 576-577; 548 NW2d 900 (1996), and citing *House Speaker v State Administrative Board*, 441 Mich 547, 562; 495 NW2d 539 (1993)). As a result, repeals by implication will not be found "if any other reasonable construction maybe given to the statutes," including reading "*in pari material* two statutes that share a common purpose or subject," even though the two statutes were enacted at different times "and contained no reference to one another." *Id.* at 36-37.

Second, application of standard rules of statutory construction require the presumption that the Legislature was aware of the Compact when it enacted the Michigan Business Tax Act, *Lenawee County Gas & Electric Co v Adrian*, 209 Mich 52, 64; 176 NW 590 (1920), and where two statutes touch upon the same subject matter, the newer, more specific statute controls over an older, general statute. *Frame v Nehls*, 452 Mich 171, 176 n 3; 550 NW2d 739 (1996). The Business Tax Act**Error! Bookmark not defined.** contains unambiguous language that mandates using the sales-factor-apportionment formula, and the Act was more recently enacted and specifically applies to its tax components for apportionment purposes. On those bases, the Business Tax Act controls over the Compact. *City of Kalamazoo*, 263 Mich App at 35 (citing *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 435; 648 NW2d 205 (2002)).

Treasury continues to assert that the Compact can be harmonized into the Business Tax Act based on the authority granted to Treasury, in the Business Tax Act and the Compact, to unilaterally require any taxpayer to use a different apportionment formula. MCL 205.581, art IV(18). The Compact provision expressly provides that:

> If the allocation and apportionment provisions of this article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition *or the tax administrator may require* in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (a) Separate accounting;
>
> (b) The exclusion of any one or more of the factors;
>
> (c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

The Business Tax Act contains a similar provision MCL 208.1309(1).

When the Legislature enacted the Business Tax Act, it mandated the application of that Act's sales-factor-apportionment formula. As a result, Treasury was legislatively commanded to determine and require that only the Act's sales-factor-apportionment formula fairly represented a taxpayer's business activity in this State. Thus, all other formulas (such as the Compact's) failed to fairly represent any taxpayer's business activity in this State unless the taxpayer petitions and proves entitlement to use a different formula. MCL 208.1309.

In addition, the Legislature's use of the phrase as "otherwise provided" in MCL 208.1301(1) incorporates by reference the Business Tax Act's apportionment relief procedure by which a taxpayer petitions Treasury for permission to use "any other method" that would "effectuate an equitable allocation and apportionment of the taxpayer's tax base." MCL 208.1309(1)(c) and (2). The only alternate means of apportionment are expressly restricted to "as otherwise provided *in this act* . . ." MCL 208.1301. The Compact is outside the Michigan Business Tax Act and its three-factor formula is only available after a taxpayer satisfies the requirements of MCL 208.1309.

2. Alternatively, the Business Tax Act repealed by implication the Compact's election provision.

If the Compact election cannot be harmonized into the Business Tax Act, then it must be held repealed by implication. "This Court has held that repeal may be inferred in two instances: 1) when it is clear that a subsequent legislative act conflicts

with a prior act, or 2) when a subsequent act of the Legislature clearly is intended to occupy the entire field covered by a prior enactment." *House Speaker v State Administrative Bd.*, 441 Mich 547, 563; 495 NW2d 539 (1993) (citing *Washtenaw Co Rd Comm'rs v Public Service Comm*, 349 Mich 663, 680; 85 NW2d 134 (1957)).

The State of Michigan enacted the Compact effective July 1, 1970. The Compact's three-factor apportionment formula applies only to income taxes, assuming a state ever enacts one. It was never really applicable in Michigan from the date of Compact's enactment because the Income Tax Act of 1967 contained the same three-factor-apportionment-formula framework, and then the Single Business Tax Act during its 30 plus year history was not an income tax that fell within the Compact's application. *Trinova v Dep't of Treasury*, 433 Mich 141; 445 NW2d 428 (1989). The Single Business Tax Act also contained the same three-factor-apportionment-formula framework. *Id.*, at 151-152.

The Business Tax Act by its express and unambiguous language makes its sales-factor-apportionment formula the *mandated* exclusive formula that precludes any other formula. Section 1301(1) of the Act, MCL 208.1301, states:

> Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter [3 Apportionment and Allocation of Tax Base.]

Immediately thereafter, in subsection 2, MCL 208.1301(2), the Legislature again made clear that the Business Tax Act's sales-factor-apportionment formula *must* be used:

> Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state *shall* be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303. [MCL 208.1303 (emphasis added).]

The Business Tax Act uses the term "shall" to mandate use of the sales-factor-apportionment formula. MCL 208.1301**Error! Bookmark not defined.**(1). "The use of the word 'shall' indicates a mandatory and imperative directive." *People v Lown*, 488 Mich 242, 278; 749 NW2d 9 (2011).

While it is true that the Compact Also uses the word "shall" to require a taxpayer to apportion business income pursuant to the Compact's formula, this use of the word shall is not relevant. MCL 205.581, Article IV, (2), and (9). The reason is that the place of and use of that "shall" in the Compact only applies if a taxpayer is able to *make* a valid election, pursuant to Article III, (1). The issue here is whether the election in Article III, (1) is available at all.

Furthermore, the Legislature was presumably aware of the Compact**Error! Bookmark not defined.** at the time the Business Tax Act was passed in 2008. And the Legislature's express intent in the language of §1301 and 1309 was to provide an exclusively different apportionment formula and apportionment relief procedure than that provided in the Compact.

All of this makes clear that the two statutes are irreconcilable opposites as to the issue of which apportionment formula is applicable to the Business Tax Act's tax components. Consequently, the first prong for implied repeal is satisfied. *House Speaker*, 441 Mich at 563.

Applicable to the alternative, second prong of that rule, whether the subsequent legislation occupies the field of the subject area, is the doctrine of last enactment. That doctrine holds that existing statutory enactments cannot be a bar to further exceptions

set forth in subsequent, substantive enactments. *Pittsfield Charter Twp v Washtenaw County*, 468 Mich 702, 713; 664 NW2d 193 (2003) (citing *Old Orchard by the Bay Assoc v Hamilton Mut Ins Co*, 434 Mich 244, 257; 454 NW2d 73 (1990)). The doctrine's premise is that the Legislature is aware of the existence of the law in effect at the time of its enactments and recognizes that one Legislature cannot bind the power of its successors. *Id.* The Compact having been enacted in 1970, it must yield to the Business Tax Act enacted in 2008.

In addition, a comparison of the different statutes' features establishes that the Business Tax Act was intended by the Legislature to occupy the field of business taxation of persons engaging in business activity in the State. The Act:

- comprehensively defines some 30 plus relevant terms,
- states the specific levy,
- specifies the rate of tax on its each of its tax components,
- sets forth exemptions from taxation,
- specifies treatment of different types of persons engaging in business activity in this State,
- mandates the use of a particular apportionment formula to the Act's tax components,
- defines its particular formula (sales-factor) and other relevant terms,
- provides a specific mechanism and standards for obtaining an opportunity to use a different apportionment formula,
- specifies credits available to persons; specifies the administration of the tax by Treasury including the promulgation of regulations,
- includes construction of the Act in relation to the General Revenue Act,
- incorporates the Revenue Act's various provisions for audits, issuing assessments, and procedures to appeal Treasury determinations,

- authorizes promulgation of rules and forms,
- specifies the cumulative nature of the Business Tax Act in addition to all other taxes,
- provides for the preparation and publishing of statistics regarding the Act,
- and address matters concerning preparation of tax returns and tax payments as well as the disposition of tax proceeds.

In contrast, the Compact is an older, general model or uniform law that has some comparable provisions to those found in a comprehensive statute but that also lacks many features one would expect to find in a comprehensive tax statute. The Compact does not provide for exemptions, or credits against an income tax. The Compact also does not specify a tax rate or tax levy. It does not define its relationship with other taxing laws of the State. And it does not contain procedures and mechanisms for challenging Treasury's application and determinations of the Compact with respect to a given taxpayer.

IBM's arguments to the contrary are unavailing.

First, the timing of the 2011 amendment to the Compact, coinciding with the amendment to the Individual Income Tax Act of 1967, makes the former amendment irrelevant for consideration here. Since 1970, the Compact was amended only one time, effective May 25, 2011. 2011 PA 40. The amendment to the Compact, retroactive to January 1, 2011, mandates the use of the Business Tax Act's apportionment and allocation provisions for any taxpayer subject to the Act. 2011 PA 40.There is no legislative analysis explaining why the Legislature chose to amend the Compact retroactive to January 1, 2011. But it is important to note that 2011 PA 40

also similarly amended the Compact in reference to the Income Tax Act of 1967, MCL 206.1 *et seq.* Article III (1), MCL 205.581.

The reason that reference in the amendment of the Compact is important is because the Income Tax Act of 1967 was contemporaneously amended by 2011 PA 38, which simultaneously and effectively replaced the Michigan Business Tax Act. Public Act 38 amended the Income Tax Act to, among many other changes in creating a new corporate income tax, require a person to apportion business income based on a sales-factor-apportionment formula beginning after December 31, 2010. MCL 206.115(2).

Further, House Bills 4361 and 4479 that became 2011 PA 38 and 2011 PA 40, respectively, starting on May 25, 2011, coincided through the legislative process up to enrollment, although they had different effective dates.[2] The relatedness of the subject matter, the timing of the House Bills proceeding through the legislative process, and no discussion for choosing the retroactive date in 2011 PA 40, strongly suggest that this was merely a minor housekeeping matter for purposes of consistency in the transition from the Act to the Income Tax Act, as amended. These facts strongly support the conclusion that the Legislature never intended that the Compact's apportionment formula apply to either the Act or the Income Tax Act of 1967, as amended. In other words, the Legislature finally, for other reasons related to the Income Tax Act, got around to doing expressly what it had already done impliedly.

Second, the Senate Fiscal Agency's analysis IBM cites does not support its position and is not part of any rule of statutory construction to discern legislative

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[2] 2011 PA 39, also coincided through the legislative process starting May 25, 2011. This statute effectively repealed the Act except as to those taxpayers eligible to continue filing MBT returns claiming previously granted credits.

intent and so should be ignored. The same holds true for revenue projections. Such projections don't determine legislative intent. They simply answer the financial question: if X is not allowed or is allowed by law, what are the Y revenue ramifications?

Third, concluding that the Business Tax Act impliedly repealed the Compact election does not violate Const 1963, art 4, § 25. It is well established that modification or amendment by implication is permissible without running afoul of Const 1963, art 4, § 25, where the new act is complete in and of itself and does not seek to amend another act by reference to its title. *In re Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441; 208 NW2d 461 (1973).

The reason is that, "[a]n act thus complete within itself, even though repealing by implication another statute, is not one of the evils sought to be prevented by art 4, § 25 and is thus not a violation of that constitutional provision." *Charter Township of Meridian v East Lansing,* 101 Mich App 805; 808-809; 300 NW2d 703 (1980) citing *In re Wright*, 360 Mich 455; 104 NW2d 509 (1960); *Washtenaw County Road Comm'rs v Public Service Comm*, 349 Mich 663; 85 NW2d 134 (1957); *Lafayette Transfer & Storage Co v Public Utilities Comm*, 287 Mich 488; 283 NW 659 (1939); *Spillman v Weimaster*, 275 Mich 93; 265 NW 787 (1936); *People v Marxhausen*, 205 Mich 559; 171 NW 557 (1919), *People v Daily*, 178 Mich 354; 144 NW 890 (1914); *People v Walter Johnson*, 85 Mich App 654, 659-660; 272 NW2d 605 (1978).

The Business Tax Act and its implied repeal of the election does not violate the purposes for which the constitutional provision was designed and therefore even

though the Compact was not immediately republished, the Business Tax Act does not violate the Constitution. *People v Koon*, 494 Mich 1, 9; 832 NW2d 734 (2013).

Finally, the case of *Nalbandian v Progressive Mich Ins Co*, 267 Mich App 7, 18; 703 NW2d 474 (2005), actually supports the conclusion that the Business Tax Act and §1301 does not contravene the Constitution. To begin, it must be remembered that in tax law there is an especially strong presumption of constitutionality. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307-308; 806 NW2d 683 (2011), citing *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003) ("Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.").

Moreover, the Court of Appeals in *Nalbandian* stated that this Court's holding in *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972), governs the application of Const 1963, art IV, § 25. 267 Mich App at 11. The *Alan* Court cited and quoted approvingly the dissenting opinion in *People v Stimmer*, 248 Mich 272, 293; 226 NW2d 899 (1927):

> The character of an act, whether amendatory or complete in itself, is to be determined [. . .] by comparison of its provisions with prior laws left in force, and if it is complete on the subject with which it deals it will not be subject to the constitutional objection, but if it attempts to amend the old law by intermingling new and different provisions with the old ones or by adding new provisions, the law on that subject must be regarded as amendatory of the old law and the law amended must be inserted at length in the new act. *Nalbandian*, 267 Mich App at 11-12, citing and quoting *Alan*, 388 Mich 278-279.

The Business Tax Act and §1301 do not seek to amend the Compact by intermingling new provisions with old ones in the Compact or to amend the Compact

by adding new provisions. Instead, the Business Tax Act and §1301 are complete in themselves and constitutional.

3. The Michigan Business Tax Act does not impair any IBM contractual rights.

Federal and state constitutions prohibit a state from enacting laws that interfere with preexisting contractual relationships. *Fun N' Sun v State (In re Certified Question)*, 447 Mich 765, 777; 527 NW2d 468 (1994). A three-prong test is applied to determine if a State law impairs obligations of contract, and the first prong is dispositive here: "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* at 777.

IBM does not have a contractual relationship with the State of Michigan, other Compact members, or the Multistate Tax Commission. No fair reading of the Compact language establishes that IBM was a party to the Compact or an intended third party beneficiary. In addition, IBM does not have any vested rights via the Compact.

This Court has long observed that any statute in which the Legislature does not covenant not to amend or repeal grants no vested rights which upon amendment or revocation are impaired. *Id.* at 777 (quoting *Franks v White Pine Copper Div*, 422 Mich 636, 654; 375 NW2d 715 (1985)). The Compact falls squarely within this rule. It contains no words that covenant that the Legislature will never amend or repeal it.

In addition, taxpayers have no vested rights in a tax statute or in the continuation of a tax law. *In re Request for Advisory Opinion Regarding*

Constitutionality of 2011 PA 38, 490 Mich at 324 (quoting *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135 (1994), citing *Ludka v Dep't of Treasury*, 155 Mich App 250, 260; 399 NW2d 490 (1986); and *United States v Carlton*, 512 US 26, 33; 114 S Ct 2018; 129 L Ed 2d 22 (1994)).

Here, IBM was not a party to the Compact. And it has no claim as a third-party beneficiary. For IBM to be a beneficiary with a vested interest in a contract, Michigan must have "undertaken to give or do or refrain from doing something directly to or for said person." MCL 600.1405(1). But Michigan never made such a commitment to IBM or any other party. Indeed, by enacting article 9, § 2 of the Michigan Constitution, the People of Michigan have forbidden the State from making any such promise with respect of taxes.

IBM explains the congressional efforts that caused State Tax Administrators alarm prompting creation of the Commission. Those Administrators were alarmed that if they failed to draft a compact establishing some uniformity across taxing jurisdictions, that Congress would enact federal law that would intrude deeply into the historic states power to tax within their respective jurisdictions. But the Compact was never about Michigan promising to do something or refrain from doing something for taxpayers' benefit. No multistate business can claim that it has a vested right in the Compact as an intended third party beneficiary under MCL 600.1405.

4. IBM's contracts-clause argument is barred by the applicable 90-day statute of limitations.

The argument that the Revenue Act's 90-day statute of limitations, MCL 205.1 *et seq.*, 205.27a(6), bars IBM's argument was not presented in the Court of Claims

because IBM never asserted in that Court that the Multistate Tax Compact is a contract that could not be amended, modified, or otherwise repealed without violating the Contracts Clause. But if the Court is going to consider IBM's unpreserved argument, then it should also consider the limitations bar. The Court has the inherent power to review an issue not raised in the trial court when there are compelling circumstances to avoid a miscarriage of justice. *Napier v Jacobs*, 429 Mich 222, 223; 414 NW2d 862 (1987).

There are no facts in dispute as to the tax year at issue (2008) or when IBM filed its annual MBT return (December 23, 2009). Thus, validity of this argument as a defense to IBM's constitutional claim is a legal issue capable of review.

The manner in which IBM raised its constitutional issue in the Court of Appeals for the first time prevented Treasury from fully vetting IBM's issue with all available defenses, and if not addressed by this Court now the result would be a miscarriage of justice. The Legislature requires persons raising constitutional claims against the validity of a taxing statute to do so within 90 days after the filing of a return, and with good reason: constitutional challenges to the validity of tax statutes present the possibility of undermining the State's fiscal integrity. *Taxpayers Allied for Constitutional Taxation v Wayne County*, 450 Mich 119, 126; 537 NW2d 596 (1995).

The Revenue Act, MCL 205.1 *et seq.*, imposes a 90-day limitations period for seeking a refund of taxes based upon the validity of a tax law based on the laws or constitution of the United States or the Michigan Constitution:

> Notwithstanding the provisions of subsection (2), a claim for refund based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963 shall not be paid unless

the claim is filed within 90 days after the date set for filing a return. [MCL 205.27a(6).]

IBM filed its Michigan Business Tax Annual Return for the 2008 tax year on December 23, 2009. It filed its Complaint seeking a tax refund on March 16, 2011. IBM asserts that the Compact is a contract and that the Act impairs an obligation of contract in violation of the Contract Clause. It raised the claim for the first time in 2012 at the Court of Appeals. To be timely, IBM was required to have filed its Complaint within 90 days after December 23, 2009. Having failed to do so, IBM's constitutional challenge is barred. For that reason alone, IBM's Contract Clause argument should be rejected.

III. The modified gross receipts component of the Business Tax Act is not an income tax under the Compact.

A. Standard of Review

This Court reviews *de novo* constitutional issues and issues of statutory construction. *Studier v Michigan Public Schools' Employee Retirement Board*, 472 Mich 642, 649; 698 NW2d 350 (2005).

B. Analysis

If the modified gross receipts tax component of the Business Tax Act is, as IBM argues, an income tax or a tax measured by income, then it ultimately unconstitutionally doubly taxes the same income that forms the business income tax component of the Business Tax Act. *C F Smith Co v Fitzgerald*, 270 Mich 659; 259 NW 352 (1935); *Ameritech Publishing Co v Dep't of Treasury*, 281 Mich App 132; 761 NW2d 470 (2008).

The analysis must start with again observing that statutes are presumed constitutional and courts are duty bound to construe them so, *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003); the courts exercise their power to declare law unconstitutional with extreme caution, *Phillips v Mirae, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004); every reasonable presumption must be indulged in favor of the validity of the act, *Phillips*, 470 Mich at 423; and *Catepillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992), there is an especially strong presumption of constitutionality with respect to taxing statutes.

Furthermore, the cardinal rules of statutory construction of a Michigan statute begin with ascertaining and giving effect to the legislative intent. *Howard Pore, Inc v State Commissioner of Revenue*, 322 Mich App 49, 58; 33 NW2d 657 (1948). If the statute is clear and unambiguous judicial construction or interpretation is not allowed. *Lorenz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992) citing *Dussia v Monroe County Employee Retirement System*, 386 Mich 244, 248-249; 191 NW2d 307 (1971). If construction is necessary then determining and giving effect to legislative intent is accomplished by applying the ordinary and plain meaning of the words employed by the Legislature. *Lorenz*, 439 Mich at 376-377, citing *Town & Country Dodge, Inc v Dept' of Treasury*, 420 Mich 226, 240; 362 NW2d 618 (1984). Further the reasonable construction given a statute must be done in view of the purpose and object sought to be accomplished by the Legislature. *Lorenz*, 439 Mich at 377, citing *Willis v Iron County Bd of Canvassers*, 183 Mich App 797, 801; 455 NW2d 405 (1990).

The modified gross receipts tax component is imposed on a taxpayer's modified gross receipts tax base. MCL 208.1203(1). In no uncertain terms, the Legislature

stated that this component is imposed "upon the privilege of doing business and *not upon income or property.*" MCL 208.1203(2). (Emphasis added).

The Legislature's stating expressly and unambiguously that the modified gross receipts tax is not on income should end further inquiry. MCL 208.1203 (2). But additional support is found in other express language defining the calculation of the modified gross receipts tax base.

In evaluating the other language of the modified gross receipts tax component, the Court must bear in mind that deciding when a particular tax statute becomes an income tax is a moving target—that is really a policy decision made by the Legislature.

For example, IBM cites the Compact's definition of "gross receipts tax". That definition states such tax measures the volume of business "in terms of gross receipts or in other terms, and in the determination of which *no deduction is allowed which would constitute the tax an income tax.* (Appellant's Br on Appeal, p 44.) That definition begs the question: At what point is there one to many deductions that convert a gross receipts tax into an income tax? IBM posits the bright line that "only deductions which would NOT make it an income tax, i.e., any deduction must be specifically and directly related to a particular transaction." *Id.*, at 45. The fallacy in IBM's bright line is that a legislature possibly could draft so many deductions related to specific transactions that a gross receipts tax is converted into an income tax. Choosing that point would be arbitrary and delve into legislative policy choices, which the Court has stated it will not review. *Detroit Edison Co v Dep't of Revenue*, 320 Mich 506, 514; 31 NW2d 809 (1948).

Concomitantly, the Court must also recognize that IBM incorrectly attempts to define the modified gross receipts tax by what the Compact defines as an income tax. Deciding what the modified gross receipts tax is, is an independent inquiry because by its structure, function, and features it is either an income tax or it is not. The decision by the Bankruptcy Court Eastern District of Michigan, Southern Division, in *In re Greektown Holdings, LLC, et al*, Case No. 08-53104, entered May 16, 2013, notwithstanding. This issue was prematurely decided by that Court and it should have abstained from deciding a pure State law question of first impression. Furthermore, the decision was wrong in its determination that even though the modified gross receipts tax is intended by the Michigan Legislature to be a gross receipts tax, it possibly could be a tax measured by income because of its deductions and exclusions with the result that it is a tax measured by income. (Appellee's Ex. 5.)

Turning to the other language of the Business Tax Act, the modified gross receipts tax base is calculated from a taxpayer's gross receipts less purchases from other firms before apportionment under the Act. MCL 208.1203(3). The Act defines "gross receipts" to mean "the entire amount received by the taxpayer from any activity whether intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others," subject to certain specified exceptions. MCL 208.1111(1).

There are amounts excluded from gross receipts including amounts received in an agency capacity for a principal for any of several purposes: proceeds less gain from disposition of certain property to the extent gain was included in federal taxable income; insurance proceeds and proceeds from certain types of transactions

characterized as loans involving automobile manufacturers; other types of manufacturers; and mortgage companies. MCL 208.1111. After computing gross receipts, as defined in MCL 208.1111(1), a taxpayer computes its modified gross receipts tax base by subtracting from gross receipts purchases from other firms. MCL 208.1203 (3).

The "less purchases from other firms" deduction is not a general business deduction that seeks to determine net income. Rather, it refers to specific and limited costs incurred during a tax year for inventory, depreciable assets, and materials and supplies, to the extent not included in inventory or depreciable assets. MCL 208.1113(6). Importantly, the "less purchases from other firms" deduction does not generally allow the deduction of purchases of services or the payment for labor, which often are reflected in net income determinations. While many of these adjustments were lobbied for and codified, the Legislature was clear in expressing its intent that the modified gross receipts tax base was not a tax on income. Indeed, the Legislature unequivocally did not intend to create a duplicative business income tax component on top of the already existing business income tax component set forth in the Act.

The plain language of MCL 208.1203(2) is supported by the analysis of two professors of law in an article published in the Wayne Law Review, when they observed that the modified gross receipts tax is best viewed as an innovative form of a "value added tax" (VAT) similar in nature to the Single Business Tax Act. (Def's Br in Supp of Summ Disposition, Attach. B, *A Policy Analysis of Michigan's Mislabeled Gross Receipts Tax*, 53 Wayne L. Rev. 1283, 1290 and 1293 (Winter, 2007)).

Those authors' comparison of the modified gross receipts tax to a VAT is confirmed by another article prepared by Steven M. Bieda, a former member of Michigan's House of Representatives, who, as a House Representative, participated in the formulation of the legislation that would become the Act. In *Facing the Challenge of Replacing the Single Business Tax: The Development and Evolution of the Michigan Business Tax*, 53 Wayne L. Rev. 1149 (Winter 2007), Mr. Bieda explained that one of the controversies regarding selecting the tax base for the modified gross receipts tax was that the Act's definition of gross receipts drew heavily from language used in the former SBTA defining "gross receipts" and thus the modified gross receipts tax looked very similar to then soon to be repealed SBTA. 53 Wayne L. Rev at 1189, and 1218-1219. (Def's Br in Supp of Summ Disposition, Attach C.)

Furthermore, the fact that the modified gross receipts tax is not a "true" or "pure" gross receipts tax that does not permit any deductions, does not alter the analysis of its nature. The SBTA was a "modified" value added tax and that fact did not change its nature into some other type of tax even after a detailed analysis by United States Supreme Court in *Trinova v Michigan Department of Treasury*, 498 US 358; 111 SCt 818; 112 LEd2d 884 (1991).[3]

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[3] Similar to Professors McIntyre and Pomp, the Supreme Court stated that a value added tax "differs in important respects from a corporate income tax. A corporate income tax is based on the philosophy of ability to pay, as it consists of some portion of the profit remaining after a company has provided for its workers, suppliers, and other creditors. A VAT, on the other hand, is a much broader measure of a firm's total business activity. Even if a business entity is unprofitable, under normal circumstances it adds value to its products and, as a consequence, will owe some VAT." 498 US at 363-364. Ultimately, the Supreme Court held that the SBTA was a value added tax, albeit modified.

The modified gross receipts tax is not an income tax by its operation. This tax does not operate as an "income tax" because it does not start with gross income and then allow for deduction of *all* "expenses" from gross income to arrive at net income, as the Compact's definition suggests and as other income taxes allow. *See* 15 USC 162; IRS Reg 1.162-1.

Similarly, the modified gross receipts tax does not start with "business income" or federal taxable income which is the starting point for calculating the business income tax component of the Act. MCL 208.1105(2) and MCL 208.1109(3). Also, unlike income taxes, the modified gross receipts tax does not allow a multitude of typical deductions on standard business expenses such as salaries, rental expenses or other costs of the property occupied by the business, insurance premiums, and various other "ordinary and necessary expenses" to reach "net income." *Cf.* 15 USC 162; IRS Reg 1.162-1. Thus, it does not measure "net income" when net income is defined as "deducting expenses from gross income," MCL 205.581, Art II, § 4, and therefore, it is not an income tax.

As a result, the modified gross receipts tax does not operate like an income tax. And, although Treasury does not propose that the modified gross receipts tax is a value-added tax, it is more closely akin to a value-added tax than an income tax.

The tax base for the modified gross receipts tax component is gross receipts modified by certain limited deductible purchases from other businesses. MCL 208.1111(1). It does not measure what a business has "derived" from the economy because it does not provide sufficient deductions of business expenses to even remotely approximate income.

Thus, the modified gross receipts tax is not an income tax because it is not based on net income but rather it measures business activity by its volume.

CONCLUSION AND RELIEF REQUESTED

The Compact is not a binding contract because the Legislature did not in unmistakable terms cede sovereignty with respect to taxes to the Commission or any other member State. In addition the Compact lacks other classic indicia of a binding contract. Because it is not a binding contract, the Legislature was able to and did properly amend, modify, or repeal by implication the Compact election through enactment of the Business Tax Act. The Business Tax Act is a complete act that occupies the field of business taxation in this State, and it expressly mandates that only the Act's apportionment formula may be applied to its tax components. The modified gross receipts tax component of the Business Tax Act is not an income tax or a tax measured by net income. This component's structure, function, features, and methods of calculation establish that it is a modified gross receipts tax.

Accordingly, Treasury respectfully requests this Court to affirm the lower courts by ruling the Compact is not a binding contract, that as a State law the Legislature is free to amend, modify, or repeal it at any time, that the Business Tax Act's mandate to use the sales-factor apportionment formula precludes use of the Compact's election to use its three factor formula, that the Business Tax Act repealed by implication the Compact's election, and that the modified gross receipts tax component is not an income tax under the Compact.

Respectfully submitted,

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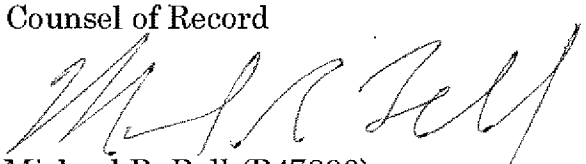

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AUTHOR: Corrigan, Gene
Tax Analysts

SUMMARY:
[*1545]

Gene Corrigan, the first executive director of the Multistate Tax Commission, served with the MTC from 1969 through 1989. He was a state tax consultant with Ernst & Young LLP, Sacramento, Calif., until his retirement last year.

LANGUAGE: English

GEOGRAPHIC: United States

INDEX: MTC; tax policy, equity; practitioners; history of taxation; apportionment; litigation, tax; formulary apportionment; state taxation, corporate tax

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Subject Area:
Tax policy issues;
Personnel, people, biographies
Cross Reference:
For a review of the history of the Multistate Tax Commission, see "Why the Multistate Tax Compact?" by James H. Peters, State Tax Notes, May 26, 1997, p. 1607; 97 STN 102-42; or Doc 97-14410 (6 pages).

TEXT:

Release Date: MARCH 03, 2000

Bill Dexter was, for many years, the preeminent litigator of major tax cases on behalf of states in courts throughout the country. In the decade from the mid-1970s to the mid-1980s, he did so from his position as general counsel of the Multistate Tax Commission (MTC). It is with good reason that the MTC is establishing a William D. Dexter Award in honor of this man, who died on December 21, 1998.

His father worked for a railroad, resulting in frequent transfers to, among other places, Des Moines, Iowa, where Bill was born on May 13, 1921. He also followed his father to Las Vegas; to New Mexico; and to Independence, Mo. Finding the life unpromising for their growing family, Bill's parents returned to their home state of Michigan to become tenant farmers near Lansing. During the Depression years, Bill

attended high school in Williamston and then put himself through Michigan State University by doing construction work and selling fruits and vegetables from the family farm. After spending four years in the Navy during World War II, Bill used the GI Bill to help him through law school at the University of Michigan. He earned additional money by selling life insurance for several years. He started law school in February 1946, married Mary Jane Buckley that June, and graduated in June 1948.

After a brief stint of law practice in Davenport, Iowa, he began work for the Michigan Treasury late in 1948. Meanwhile, Mary Jane started medical school at the University of Michigan in September 1946; she graduated in June 1950. They soon moved to nearby Mason, where she practiced medicine for 17 years while raising four sons. When she completed her residency in psychiatry at a hospital in Ypsilanti in 1973, she and Bill were ready to realize their lifelong dream of living in the Pacific Northwest. In Olympia, Wash., Bill joined the state's Department of Revenue as an assistant attorney general and she practiced psychiatry at the County Mental Health Center. They continued to live there, and he continued to work from there, even after he became the MTC's general counsel.

During the years in Michigan, Bill was a workaholic, an aggressive litigator who became a master at managing complex cases. Soon promoted to chief counsel for the revenue section of Treasury, he litigated innumerable cases in the Michigan courts. A man who simply refused to be defeated, he is reputed to have taken one case to the Michigan Supreme Court seven times, whereupon the court finally ruled in his favor.

On occasion, he could go a bit overboard in his efforts to pressure corporate taxpayers into doing what he considered to be the right thing. He could stir resentment among opponents who were not as convinced as he that he was right. He could even drive his friends and supporters a little crazy with his intensity and single- mindedness. He had tremendous energy, determination, zeal, knowledge, and courage, and his writing, speaking, and litigation skills made him a formidable warrior. He fought for consistent compliance with state tax laws and fairness in attribution of income among states in which each multistate entity conducted business.

Not widely recognized was his willingness to call to the attention of the states instances in which taxpayers were being treated inconsistently or unfairly. At the MTC's 1980 Annual Meeting, he closed his plea for equity and uniformity with the candid acknowledgment that "the current variety in state income tax laws, rules and procedures cannot truly be justified either to business representatives or to students of good government." In private, he would seethe at any perceived unfairness on the part of a state. **[*1546]** In the late 1950s, Bill participated with Louis Del Duca, a professor at Dickinson Law School who was a consultant for the Pennsylvania attorney general, before the Louisiana Supreme Court in the successful litigation of Brown-Forman Distillers Corp. v. Louisiana Collector of Revenue. /1/ This action brought him onto the stage of multistate taxation. That case and another of a similar nature in the same court, International Shoe Co. v. Fontenot, /2/ triggered the enactment of Public Law 86-272 in 1959. That law essentially overrode the decisions in the two cases by decreeing that an out-of-state retailer would not subject itself to the income taxing jurisdiction of a state if its only activities in the state consisted of soliciting orders that were sent outside the state for approval or rejection and, if approved, were filled by shipment or delivery from outside the state.

P.L. 86-272, as subsequently amended, also created the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives. Chaired by Rep. Edwin Willis of Louisiana, the subcommittee became known as the Willis Committee. It began its effort by conducting extensive hearings aimed at framing the issues to be addressed. In 1962, it published two volumes that consisted of the testimony presented at those hearings. It collected additional information via questionnaires, further hearings, and research, all of which it took into account in publishing its three-volume report serially in 1964 and 1965. It issued a fourth volume, consisting of its recommendations, in October 1965. The report constituted the most extensive and in-depth analysis of interstate taxation ever produced.

In light of developments since that time, one must conclude that the recommendations constituted a highly constructive approach to the problems at hand -- an approach that, in retrospect, the states would have been wise to accept. Not having the benefits of a crystal ball, however, they opposed H.R. 1798, the bill that sought to convert those recommendations into law. /3/ The report of the Subcommittee's 1966 hearings on that bill filled two more volumes.

Meanwhile, Bill Dexter was a leader among state tax administration personnel who spoke out against the proposed legislation, petitioned political leaders to oppose it, and made sure that their governors, attorneys general, and -- in some cases -- their congressmen testified against it or otherwise opposed it.

I made my first contact with Bill one morning in the mid-1960s when he and Lou Del Duca wandered into my office with the Illinois Department of Revenue, in Chicago. They were highly agitated over the fact that some corporate tax lawyers, led by General Motors tax attorney Donald Barnes, were trying to get the Taxation Section of the American Bar Association to support what Bill and Lou considered to be undesirable aspects of H.R. 11798. They wanted Illinois to join the fray. Little did I realize that my affirmative response to their recruiting effort would dramatically change my life. I quickly found myself deeply involved in efforts to organize opposition to federal intervention in an area that we perceived as being reserved to the states by the U.S. Constitution. Such activities ultimately led to my becoming the first executive director of the Multistate Tax Commission.

Bill had participated extensively in the states' creation of the MTC as well as in subsequent important committee work for the commission. He served as the hearing officer on what became known as the Uniform Allocation and Apportionment Regulations, promulgated by the MTC. During that process, he espoused the philosophy that "intangible income" such as interest, dividends, and royalties could in many instances be considered to be "business income" that was subject to apportionment among all of the states in which the recipient conducted its business. Formerly, such income had been considered to be allocable solely to the recipient's state of commercial domicile. Bill's recommended apportionment approach was incorporated into the final version of the regulations, adopted by the MTC on February 21, 1973. Those regulations have withstood court tests well, and they continue to serve as the frame of reference for most disputes pertaining to attribution of income among the states. But their approach to intangible income triggered major opposition from the business community. So did the MTC's application, in joint audits, of the unitary business principle through worldwide combined reporting.

Bill Dexter came into his own when, in 1975, he became general counsel of the MTC. By then, his was a recognized voice of advocacy for alternatives to proposed federal legislation.

The idea behind the MTC was that the states should cooperate with each other in responding constructively to business complaints about the income tax treatment of entities that operated in more than one state. Among the means for doing so was increased uniformity in the manner in which a corporation's income was attributed among the states.

Toward that end, the Multistate Tax Compact legislation included in its body the Uniform Division of Income for Tax **[*1547]** Purposes Act (UDITPA). /4/ It also provided a credit against a state's use tax for sales tax previously paid to another state on the same transaction, and it provided for the performance of joint audits by MTC auditors. (A joint audit is performed on a multistate business on behalf of several states by an MTC auditor.) It tended to impose upon business the same consistency in treatment from state to state the absence of which had caused the business community to complain to Congress. This turnabout was not popular with that community. Nor was the MTC's treatment of most intangible income as apportionable business income and its use of worldwide combined reporting in performing the audits. A large group of its members sued the MTC, relying upon the Compact Clause of the Constitution in an attempt to destroy the commission. (For a review of this history, see "Why the Multistate Tax Compact?" by James H. Peters, State Tax Notes, May 26, 1997, p. 1607; 97 STN 102-42; or Doc 97-14410 (6 pages).) The ensuing litigation was threatening to spell disaster for the MTC when Bill Dexter came aboard in 1975.

The MTC provided Bill with the basis and support for the promotion of his tax philosophy and for his establishment of the validity of that philosophy in the courts. His aims and those of the states melded, through the MTC, into a formidable force that commanded the stage of interstate tax administration throughout the 1970s. His success provides a background for today's continuing state efforts to cope with interstate taxation problems. This retrospective now seeks to recall some of the highlights of the latter-day career of this unique man.

Bill Dexter was truly one of a kind. His adversaries sometimes considered that one to be one too many. He lived on his own personal Cloud Nine, where legal citations, litigation ideas, and idealistic notions provided the background and support for his brilliance and fearlessness in pursuing our goals. Whether

before large audiences, a single judge in a local court, or the U.S. Supreme Court, he could and often would reel off the full names and case numbers of a series of federal and state court opinions that pertained to the state tax problem at hand, and he would discuss them in learned detail.

Bill was a teacher. For years, he spoke at seminars conducted by the MTC across the country. In one instance he created and presented single-handed a three-day seminar for assistant attorneys general. Its purpose was to school them in arguing state tax cases effectively before the courts. There and in later efforts in Washington, he helped state lawyers prepare for argumentation before the U.S. Supreme Court. He was always generous with his time and help in such instances, as he was in all other aspects of his life. Lawyers who worked as his assistants from time to time throughout his career had a profound respect for the quality of both the man and his work.

No one could be around Bill very long without becoming steeped in the law of state and interstate taxation. One reason was that he never tired of the subject and that he never worried about repeating himself. Old-timers attending meetings at which he spoke could sometimes be heard to lament that they had heard him before. They missed the point, which was that many others in the audience had not been exposed to his in-depth analysis of case law. If it became old hat to some, all well and good, but it was important to consider the needs of new students and make new converts when such opportunities arose.

In this sense, Bill was also a preacher. He habitually not only delivered information but conveyed a message as well -- a message of how state tax administration should be conducted. He was similarly inclined spiritually. In 1983, he and Mary Jane parted amicably after 37 years of marriage, and he retired from the MTC to attend a Missouri ministerial school. His stay at the school lasted less than a month. He told me, with a sense of wonder in his voice, that the faculty there had not seemed to be interested in his ideas. He apparently had preached to the preachers at the school, and they, not relishing such a reversal of form, had asked him to leave. He returned to the MTC and almost immediately became immersed once again in litigation.

If Bill could be lured from his concerns about cases that he was handling, he could be a delightful conversationalist on a broad spectrum of subjects and activities. But such occasions were relatively rare. He was more likely to suddenly interrupt a purely social conversation with a discourse on some legal controversy that concerned him at the moment. In our early days together, I considered such interruptions to be irritating and rude. I soon realized, however, that anything that did not pertain to the legal problem at hand constituted an interruption of Bill's thinking process; that he had merely tolerated the interruption until he could get us focused on the problem that he was pondering. Because we usually shared that problem with him and because his success in coping with it was of vital importance to us, we could hardly object.

At such times, his concentration could be so intense that he would be almost unaware of what was going on around him. One evening, Bill, my wife, and I were on a flatboat on the Trinity River in San Antonio. The boat was not much more than a raft with sides. It traveled up and down a short stretch of the river between river-edge walkways through the "touristy" part of the city. Passengers sat facing inboard on benches that lined the sides of the boat. The night was enjoyably warm and starry as we lolled along the stream. I was sitting between Bill and my wife, Billie. Bill was turned our way and leaning a bit toward the center of the boat as he directed a lengthy commentary at Billie. His back was turned to a complete stranger sitting to his left. After a while, the man took out a pack of cigarettes and started to take one out. Bill, as if he had eyes in the back of his head and without interrupting his flow of conversation, reached back and took the cigarette. Somewhat startled, the man put another cigarette in his mouth and pulled out a lighter. Continuing his talk, Bill took the lighter, lit what was now his **[*1548]** own cigarette, and handed the lighter back to the man. The man looked dazedly at me, and got up and moved to another seat. Bill had never acknowledged him, nor for that matter had he even noticed him. Later, he proved to have been completely unaware of the incident.

One of Bill's peculiarities was the way he fought his smoking habit. He did so by refraining from carrying cigarettes. It was not that he was cheap; he was, in fact, generous to a fault. It was just that he did not know how else to limit his smoking. Yet if someone lit a cigarette in his vicinity, he never hesitated to cadge one for himself. He and I were once on a dais with several other people at a meeting in Denver. Bill was to be the next speaker. In the back of a room in which some 200 people were seated, the flash of someone's lighter signaled to Bill the opportunity to smoke. Bill got up from his chair, walked

the length of the dais and around the side of the room to the site of the lighter. Shortly, with a glint of satisfaction on his face, he returned to the dais, lighted cigarette in hand.

He finally did stop smoking in 1984, but his lungs were by then afflicted with the pulmonary fibrosis that ultimately killed him. That he survived and remained so active until his death at 77 was remarkable.

Bill's intensity and dedication were the key to his innumerable successes before the courts. When he became the MTC's general counsel in 1975, the commission was mired in litigation with 16 of the nation's largest corporations. They had filed suit in U.S. District Court in New York, challenging the MTC on constitutional grounds. They claimed that the MTC was a compact organization of the type that would be valid only if it received congressional consent.

Begun in 1972, the litigation was now at a virtual standstill. The opposition, a prominent New York law firm, was deluging the commission and its member states with interrogatories ad infinitum, and the MTC's mounting legal fees were devouring its financial resources. When Bill, representing the state of Washington, insisted that the MTC try to cut the litigation short by filing a Motion for Summary Judgment, our attorney refused on the ground that the court had rejected a similar motion as "frivolous" and that the proposed motion could result in a disastrous ruling by the court. Bill disagreed vehemently, maintaining that the court's use of the term "frivolous" had been directed at an entirely different type of motion, one in the nature of a demurrer.

When the MTC considered the matter at a special meeting in 1975, there had not yet been a hearing on the constitutional issue, and our attorney foresaw years of responses to interrogatories and the expenditure of hundreds of thousands of additional dollars before one could be had. When an attorney from a prominent Washington, D.C., law firm supported Bill Dexter's position, the commission hired him to represent it from then on.

He immediately filed the Motion for Summary Judgment. He also issued dozens of interrogatories to the 16 plaintiffs, much to their outrage. At its first opportunity, the special three-judge Federal District Court granted the motion. This opened the way for a direct appeal to the U.S. Supreme Court, for which Bill immediately began preparation.

The suing corporations now engaged the services of the preeminent Supreme Court barrister to handle the appeal -- Erwin Griswold, former dean of the Harvard Law School. Although well along in years at 72, he was probably the most widely respected of all advocates before the High Court at the time. Undaunted, Bill Dexter concentrated his enormous energy and intellectual power on single- handedly writing the brief and preparing for the argumentation before the Court. At the same time, he orchestrated the filing of supporting briefs amici curiae by several states and state organizations. His prodigious effort and his effective argumentation before the Court resulted in victory for the MTC and the states in U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978). Later, looking back over his life, Erwin Griswold paid an indirect tribute to Bill Dexter. The Harvard Law Review, in its obituary of the dean, reported that Griswold had referred to the U.S. Steel decision as "perhaps my greatest professional disappointment." /5/ It was clearly Bill Dexter's greatest professional triumph.

Meanwhile, Bill had also been participating in the litigation of cases all over the country on behalf of the MTC and its members, filing briefs, acting as a consultant, or participating in argument (or a combination of the above). He was the lead, and almost always the sole, attorney in all MTC cases. He continued this widespread activity until 1985, when he again retired from the MTC, this time permanently.

Included among the cases in which he was involved were "smoke shop" cases with Indian tribes in Arizona, New Mexico, and Washington state, and a large body of cases many of which reached state supreme courts, several of which were filed by corporations in federal courts, and seven of which were ultimately decided by the U.S. Supreme Court. They involved a variety of subjects, among them taxing jurisdiction (e.g., the Heublein case in South Carolina); the validity of MTC joint audits (e.g., the Hertz and American Can cases in Washington; the Colgate-Palmolive, IBM, and International Harvester cases in North Dakota; the International Harvester, Becker Industries, and Union Carbide cases in Idaho; the Merck and Dow cases in Oregon; the International Harvester case in the Ninth Federal District Court; and, ultimately, the U.S. Steel case in the U.S. Supreme Court); the validity of "separate accounting" (e.g., the Exxon case in Wisconsin); state audit enforcement procedures (e.g., the Kraftco case in

Colorado and the Cargill case in North Dakota); the application of the unitary business principle through combination in apportioning income among the states (e.g., the Caterpillar/Chicago Bridge & Iron case in Illinois, the ASARCO case in Idaho, the Woolworth case in New Mexico, and the Dow Chemical case in Kansas); the attribution of income of unitary businesses having subsidiaries overseas (e.g., the Caterpillar Tractor/Chicago Bridge & Iron case in Illinois); the application of the "throwback" rule (e.g., the Scott and Williams cases in New Hampshire); the treatment of foreign dividends (e.g., the Mobil case in Vermont); the distinction between business and nonbusiness income (e.g., the Montgomery Ward case in Arkansas **[*1549]** and the Mobil case in Vermont); and discriminatory taxation (e.g., Hawaii's Bacchus and Aloha Airlines cases in the U. S. Supreme Court). In addition to the latter two cases, the ASARCO, Caterpillar, Exxon, Mobil, and Woolworth cases were all ultimately decided by the Supreme Court. Bill appeared before the Court in Mobil, U.S. Steel, Aloha Airlines, and Bacchus. His successful argumentation in the U.S. Steel and Mobil cases marked the pinnacles of his career. Both were landmark cases in which his argumentation was highly effective.

Throughout the years while he was engaged in such litigation, he was constantly delivering speeches around the country, conducting seminars, writing articles, and helping other state lawyers. He was a key participant in the states' successful effort to defeat an attempt to incorporate an anti-combined-reporting provision into the 1978 U.K.-U.S. Tax Treaty. In his last year with the MTC, he worked extensively with the Task Force of the 1984-85 Presidential Working Group in its efforts to achieve an accommodation between the states and the business community concerning the applicability of the unitary business principle through combined reporting.

Bill was a serious man, but one who had a flair for the spectacular and could be whimsical on occasion. He was a zealot with respect not only to tax administration but also to other aspects of life. He was an unflappable thinker on his feet, but he could be impetuous.

In the late 1970s, he and I happened to be walking by a Peugeot auto dealership one day. On the spur of the moment, he walked in and, after a relatively brief conversation with the dealer, ordered one. He drove it enthusiastically for several years.

After only his first date with a former nun late in 1983, he advised me that he was going to marry her. Their marriage took place only a few weeks later, producing a happy final 15 years of his life. Much of it was devoted to traveling, to extensive outdoor activities such as hiking, biking, boating (he and Mary Jane at one time had owned, and sailed Puget Sound in, a beautiful 33-foot sailboat that verged on yachthood), skiing, and mountain climbing, and to contemplating the mysteries of life. His new wife, Marilyn, was his constant good-natured companion throughout. Even after treatment for prostate cancer and the replacement of both hips in the last seven years of his life, he insisted on continuing such athletic activities at a level that would have been considered strenuous for even a healthy man of his age. For example, he and Marilyn hiked down and up the Grand Canyon in one day, a most unusual and demanding accomplishment.

Marilyn even weathered Bill's lifelong devotion to Cortez recreational vehicles, manufactured by Clark Motor Co. He considered them to be underrated road palaces on which he could always get bargains. They were his hobby. The problem was that he always acquired them when they were already old, and they were always breaking down. This became especially troublesome after the company stopped making the Cortez in 1975. Getting parts on old models, which had been difficult enough before, now became a major problem. Cortezes were always needing parts. It seemed that Bill always had at least two Cortezes on hand, one that he was using and one that he was trying to get repaired so that he could sell it. And he was usually keeping an eye open for another slightly newer, i.e., less ancient, model.

During my last conversation with him in September 1998, Bill advised me of his latest acquisition. He described it as a beautiful, spacious, deluxe, modern RV that was in great shape. He discounted the fact that it was 13 years old. It was the first of his RVs that was not a Cortez. /6/ He and Marilyn would shortly be driving it to Mexico on a vacation trip. When I advised him that I would be in Tucson at the time, he agreed that they would stop by there to see me on the way to Mexico. They never showed up. I later learned that the vehicle's engine had blown up in Los Angeles and that Bill and Marilyn had had to proceed to Mexico by air. Once there, Bill experienced difficulty in breathing and soon collapsed. He was immediately transported home, where he died peacefully a few days later surrounded by his family, including his four sons. He left Marilyn with two RVs, including the one in Los

Angeles, which was awaiting major repairs.

Bill and Marilyn had, for several years, lived in a large home on Salt Spring Island, just off Vancouver Island, in British Columbia. Having a spectacular view of the San Juan Straits, it was another of his great enthusiasms. As soon as they had substantially upgraded the place, though, Bill and Marilyn decided that it was more than they needed. They had long been trying to sell it when Bill died. Marilyn continues to try.

My mental picture of Bill Dexter is that of his appearance when, in the middle of a peroration, his face, normally chalk white, would turn to a red that looked especially bright against the white background of his hair. He would rise to the tip of his toes and seem about to spring over the lectern as he made his point. He was eloquent; he was intense; he was passionate. He was also proud of the turquoise pin that adorned the Western string tie that was his trademark.

Bill did not limit his passion to good state tax administration. He was passionately concerned about the clear-cutting of forests, about the plight of the poor in Third World nations, about politics, about the practice of law, about religion, about his family (especially his eight grandchildren), about life in general. He gave his all. He was a great lawyer, a fine man, and a tried and true friend. He was an unforgettable character. His legacy is that of true devotion to fair, reasonable, and effective taxation of multistate businesses. He should not be forgotten. The MTC's establishment of the William D. Dexter Award is well-calculated to help preserve his memory.

FOOTNOTES

/1/ 234 La. 651 (1958), appeal dismissed and cert. denied, 359 U.S. 28 (1959).

/2/ 236 La. 279 (1958), cert. denied, 359 U.S. 984 (1959).

/3/ Many corporations also opposed certain aspects of the bill, particularly a provision that would have included in a domestic corporation's apportionable base dividends received from foreign subsidiaries. Subsequent versions of the bill excluded that provision and others that were opposed by the business community, leaving in place the other features of H.R. 11798 to which the states were adamantly opposed.

/4/ UDITPA had been promulgated in 1957 as proposed model legislation by the National Conference of Commissioners on Uniform State Laws, then an adjunct of the American Bar Association. Only a handful of states had adopted it by 1967. Within a few years thereafter, nearly half of the income tax states had adopted it, almost exclusively through enactment of the Multistate Tax Compact legislation. Today, most income tax states have adopted most of its provisions except for one major one -- a uniform, evenly weighted three-factor formula consisting of property, payroll, and sales. The movement of the states to a more heavily weighted sales factor has at least temporarily defeated the uniformity sought by the Multistate Tax Compact. It may be, however, that such uniformity will ultimately be achieved if the states continue the current trend toward more and more heavily weighting the sales formula until all of them use only that factor for apportionment purposes, as do, for example, Iowa and Nebraska currently. There is irony in the fact that the opposition of many states to H.R. 11798 was based on their insistence that the evenly weighted three-factor formula be preserved. Indeed, in later years Edwin Willis expressed the opinion that the bill's exclusion of a sales factor from its proposed formula was the main contributor to the ultimate failure of the bill to achieve enactment.

/5/ Harvard Law Review, Vol. 108, p. 1001. Griswold died on November 19, 1994, at the age of 90.

/6/ Three years earlier he had come to Sacramento to complete the purchase of his last Cortez, a 1973 model, which he termed a beautiful vehicle and a tremendous bargain. Having seen it advertised in an RV catalog, he had bought it over the phone. When he showed up at our home with it to stay overnight, I declined, as diplomatically as I could, his offer to take me for a ride in it. To me, it was just old and decrepit.

********** End of Document **********

(2)

For Opinion See 98 S.Ct. 799

Supreme Court of the United States.
UNITED STATES STEEL CORPORATION, et al., on behalf of themselves and all persons similarly situated, Appellants,
v.
MULTISTATE TAX COMMISSION, et al., Appellees.
No. 76-635.
October Term, 1976.
July 9, 1977.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Brief of Appellees

William D. Dexter, Bank of Olympia Building, Olympia, Washington 98501, (206) 943-8320.Samuel N. Greenspoon, 600 - 3rd Avenue, New York, New York 10016, (212) 867-0606, Attorneys for Appellees.

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Cases:

Weinfeld, What Did the Framers of the Federal Constitution Mean By Agreements or Compacts? 3 U. Chi. L. Rev. 453 (1936) ... 43-44

*1 QUESTIONS PRESENTED

1. Is the Multistate Tax Compact invalid on its face under Section 10, Article I of the Constitution of the United States and should its Commission be disbanded because the Compact has not been consented to by Congress?

2. Does the Compact impose an unreasonable burden on or discriminate against interstate commerce in violation of Section 8 of Article I of the Constitution of the United States?

*2 3. Does the Compact deny multistate taxpayers due process and equal protection of the laws in violation of the Fourteenth Amendment of the U.S. Constitution?

STATEMENT OF THE CASE

Appellants' "Statement" of the case is inaccurate, incomplete, misleading and contains numerous statements and opinion not supported by the record.

This action involves the validity of the Multistate Tax Compact (hereinafter referred to as the "Compact") on its face. In their Amended Complaint (A. 2-10), the Appellants asserted that the Compact violates certain provisions of the United States Constitution and sought declaratory and injunctive relief against its enforcement. They asked that the Compact be declared invalid on its face and that its governing body, the Multistate Tax Commission, be disbanded (A. 9-10). The Appellees, asserting that only questions of law were involved, moved for a summary judgment and requested. that the motion be heard by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (A. 20-22).

As required by local court rule 9(g), in support of Appellees' motion for summary judgment, Appellees filed a "Statement Under Rule 9 (g)" (A. 23-37), supported by the Affidavit of Eugene Corrigan, Executive Director of the Multistate Tax Commission (A. 38-41) and a copy of the Compact as enacted by the State of Washington which is typical of the Compact*3 enacted by all member states (Jur. St. App. E. 54a-79a, A. 42).

There is no dispute as to any material fact in this cause including the facts in the 9 (g) statement and the Corrigan affidavit (A. 43).

The Multistate Tax Commission (hereinafter referred to as the "Commission") is the administrative agency for the Compact and is created by Article VI of the Compact (A. 33). The members of the Commission are the tax administrators of the member states (A. 34). It is undisputed (and indisputable) that:

1. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the appellants or any other person whatsoever (A. 34; Jur. St. App. A. 11a).

2. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions including (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state (A. 36; Jur. St. App. A. 11a-12a).

3. The conduct of a joint audit by the Commission on behalf of member states or subdivisions *4 thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any

multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact (A. 34-35; Jur. St. App. A. 11a).

4. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers (Jur. St. App. A. 12a).

5. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto,* disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms (A. 36; Jur. St. App. A. 11a). If so adopted, they become the rules, regulations and forms of the adopting state.

6. The laws with respect to the maintenance of ***5** records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records (A. 35).

Congress, other than by enactment of minimal jurisdictional standards under Public Law 86-272, has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to the Appellants or corporations similarly situated (A. 36-37; Jur. St. App. A. 12a-13a).

After analyzing the constitutional issues in light of the undisputed facts, the three-judge court below held:
"* * * we find the Compact to be lawful, and the Compact's creation, the Commission, to be a lawfully constituted body." (Jur. St. App. A. 20a)

The court based its holding upon the following findings:

1. There is no material issue of fact in dispute. (Jur. St., App. A. 3a).

2. The Compact does not tend to increase the political power of the member states or encroach upon or interfere with federal supremacy and therefore does not violate the Compact Clause (Jur. St. App. A. 11a, 12a).

3. The Compact does not unreasonably burden or discriminate against interstate commerce (Jur. St. App. A. 14a, 15a, 20a).

***6** 4. The Compact does not deny Appellants equal protection or due process of law (Jur. St. App. A. 20a).

5. The Compact does not subject Appellants to unreasonable searches and seizures (Jur. St. App. A. 20a, 21a).

The Appellants' argument on appeal is confined almost exclusively to the congressional consent question. As to this question, they abandon any consideration of the Compact provisions. They refer to none of them in their argument, but rely instead on conclusionary statements of their own choosing, which are not supported by the record and are concerned with wholly irrelevant matters.

While in their statement of the case, Appellants attribute various "powers" to the Commission, they fail to inform the Court that the Commission functions only as an advisory agency and that its work product is not binding on anyone-- State or taxpayer. It is misleading for the Appellants to label the Commission an independent body and to endow it with various powers when it is really only an advisory agency of the member states. The Appellees that

are the individual administrators of their own tax laws deny that they have surrendered to the Commission any of their powers to fix and determine the tax liabilities of any taxpayers. It is clear that under the Compact the member states have not surrendered any of their powers.

At this juncture it is important to examine the *7 Compact language to see what it does and does not do.[FN1] It contains twelve Articles.

> FN1. The District Court set forth a proper analysis of the provisions of the Compact (Jur. St. App. A. 5a-9a). Those provisions are also analyzed in the Rule 9(g) Statement of the Appellees (A. 25-33). The full text of the Compact is contained in Jur. St. App. E. 54a-79a.

Article I of the Compact states the purposes of the Compact are to:
"1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes;
"2. Promote uniformity or compatibility in significant components of tax systems;
"3. Facilitate taxpayer convenience and compliance in the filing of tax returns and other phases of tax administration;
"4. Avoid duplicate taxation."

It contains no grant of power to the Commission or its executive director.

Article II contains various definitions and has no operative effect apart from other provisions of the Compact.

Article III, § 1 and Article IV allow interstate taxpayers an option to (i) divide their income in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) promulgated by the National Conference of Commissioners on Uniform State Laws (see Volume 9a, Uniform Laws Annotated, p. 448) or (ii) in accordance with otherwise applicable state law. Clearly, any state may independently, apart from any compact, provide an interstate taxpayer with this same option. In states, such as Michigan and Montana, which incorporate*8 UDITPA in their income tax laws, it has no practical force or effect.

Article III, § 2 allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax must allow a taxpayer meeting certain requirements to file a short form and to compute income tax liability simply on the basis of a percentage of sales volume within the state. Again like Article III, § 1 and Article IV, this option is essentially a uniform act and could be adopted by any state independently of any compact even though it has been specifically devised for the Compact. *Neither Article III nor Article IV grants any power to the Commission or to its Executive Director.*

Article V adopts certain substantive provisions relating to sales and use tax laws. Again, the provisions of this article are essentially a uniform act which could have been adopted independently of any Compact. Those provisions do not grant any powers to the Commission or to its Executive Director.

Article VI pertains to the Commission's operations. Sections 1, 2 and 4 involve the creation and internal management of the Commission.

Section 1 provides for membership on the Commission, voting rights, meetings, personnel, offices, adoption of bylaws, etc. The Commission is composed of one member from each party state who is the head of the state agency charged with the administration of the types of taxes to which the Compact applies. Alternates and nonvoting representation are provided*9 for. An executive director is provided for and he is given the power to appoint and discharge personnel "irrespective of the civil service, personnel or other merit system laws of party states." This is a matter that does not rise to constitutional proportions nor does it concern Appellants or any other taxpayer.

Section 2 provides for an executive committee to function according to the bylaws and empowers the Commission to create advisory and technical committees, membership on which may include any private individuals and public officials.

Section 4 is concerned with the finances of the Commission.

Section 3, the "powers" provision, generally covers the fields of research, dissemination of information, and proposal of recommendations. It reads:
"In addition to powers conferred elsewhere in this compact, the commission shall have power to:
(a) Study state and local tax systems and particular types of state and local taxes.
(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.
(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.
(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact."

***10** These "powers" do not include anything that have any compulsory effect on the states or taxpayers. They are merely powers to advise and to make recommendations to the party states. Any association of the states could perform the same function.

Article VII provides that the Commission may adopt uniform regulations and forms for the administration of various types of taxes in the party states when such taxes involve uniform or similar provisions of laws among the party states. This article also provides for certain procedures necessary for the adoption of any regulations and forms by the Commission. Section 3 provides that such uniform regulations *to be legally effective must be adopted by the individual states, in accordance with their own laws and procedures for the adoption of regulations.* Thus, the Commission's function under Article VII is to make recommendations only. This function could be performed by groups such as the National Association of Tax Administrators, the Council of State Governments, the Conference of Commissioners on Uniform State Tax Laws, the American Bar Association or by any ad hoc group of tax administrators or even any individual or entity whatsoever. The only regulations the Commission has adopted are those pertaining to Article IV of the Compact.[FN2]

FN2. These regulations were adopted on February 21, 1973. They are set out as Appendix J, pp. 64-84 of the Seventh Annual Report of the Multistate Tax Commission. Contrary to Appellants' argument, these regulations distinguish between business and nonbusiness income and provide for the specific allocation of non-business income. See *infra,* pages 64-68 for a fuller discussion of this subject matter.

Article VIII pertains to joint audits and by its ***11** provisions is in force only in those party states that specifically provide therefor by state statute. Section 2 of Article VIII permits a party state or subdivision thereof to request the Commission to perform an audit on its behalf. It further provides that in responding to a request of a party state the Commission "shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise" of any taxpayer subject to the joint audit. *The Commission merely acts pursuant to such request as an agent of the requesting party states and in conformity with the laws of the requesting party-states.*

Section 3 of Article VIII provides that the Commission may require the attendance of any person within the state where it is conducting an audit for purpose of giving testimony with respect to any account, book, paper, document, or other record, property or stock of merchandise being examined in connection with the audit. It further provides that if the person is not within such state he may

be required to attend for such a purpose within the state of which he is a resident provided that state has adopted Article VIII of the Compact.

Section 4 of Article VIII provides that:
"The Commission may apply to any court having the power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order *12 shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in states that have adopted this article."

Section 5 of Article VIII gives the Commission the power to decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that in the terms requested the audit is impracticable of satisfactory performance. It further provides that:
"If the commission, on the basis of its experience, has reason to believe that an audit of the particular taxpayer, * * * would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission."

Section 6 of Article VIII contains the confidentiality provision and provides:
"Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer*13 to keep records for any period not otherwise required by law."

Section 7 of Article VIII reads:
"Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or of any of their subdivisions are not superseded or invalidated by this article."

Section 8 of Article VIII prohibits the Commission from making any charges for an audit against any taxpayer.

The power of the Commission pursuant to Article VIII is simply to gather audit information from the taxpayer subject to a joint audit and to turn this information over to the respective states requesting the joint audit for what use they wish to make of it. It is no different from the power possessed by individual state tax administrators to require the disclosure of facts necessary for audit purposes.

Article IX pertains to arbitration. Section 3 of Article IX gives the taxpayer an option to submit certain apportionment or allocation disputes to an arbitration panel. Section 1 specifically provides that "whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this article in effect * * *" This article is not in effect at the present time.

Article X, § 1 provides that the Compact shall enter into force when enacted into law by any seven states. Section 2 of Article X permits a party state to withdraw from the Compact by enacting a statute *14 repealing the same and further provides that withdrawals shall not affect any liability already incurred by or chargeable to a party state prior to the time of withdrawal. Section 3 of Article X preserves proceedings commenced before an arbitration board prior to withdrawal.

Article XI provides:
"Nothing in this compact shall be construed to:
(a) Affect the power of any state or subdivision thereof to

fix rates of taxation, except that a party state shall be obligated to implement Article III, § 2 of this compact.[FN*]

FN* (This allows certain taxpayers to elect, at their option, certain procedures.)

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any other tax on motor fuel, other than a sales tax: PROVIDED, That the definition of 'tax' in Article VIII 9 may apply for the purposes of that article and the commission's power of studying recommendations pursuant to Article IV 3 may apply.
(c) Withdraw or limited jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation, or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.
(d) Supersede or limit the jurisdiction of any court of the United States."

The implementation of Article III, § 2 of the Compact is up to the legislature of the respective states and the Commission has no power concerning the same.

Article XII states that the Compact shall be liberally*15 construed so as to effectuate the purposes thereof and further provides:
"The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any state or the United States or the applicability thereof to any government agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government agency, person or circumstance shall not be affected thereby. * * *"

An examination of the provisions of the Compact thus indicates that it is a package of arrangements which traditionally have been used, independently of any formal compact, to further interstate uniformity and cooperation, such as uniform or reciprocal acts. It creates a body of state tax officials to make advisory recommendations with respect to statutory or administrative changes. All of these things recommended by the Commission may be put into operation only by the individual states themselves, acting either through their legislatures or their individual tax administrators.

The only question really argued by Appellants in this case is whether such a Compact requires congressional consent within the purview of the decisions of this Court which have interpreted the scope of the compact clause (Section 10, Article I, Clause 3, Constitution of the United States).

SUMMARY OF ARGUMENT

I

The basic question on appeal is whether the *16 Compact requires congressional consent. This is resolved by an examination of the provisions of the Compact and determining which of those provisions, if any, require congressional consent before they can be placed in operation by the member states. This poses only a question of law (Jur. St. App. A. 3a).

In *Virginia v. Tennessee*, 148 U.S. 503 (1893), this court determined that only those compacts or agreements which shifted political power among the states in a manner which tended to encroach upon or interfere with federal supremacy required congressional consent. The *Virginia v. Tennessee* interpretation of the compact clause has been universally followed since its pronouncement in 1893 and was recently reaffirmed by this court in *New Hampshire v. Maine*, 426 U.S. 363 (1976). It is not dicta and has not been limited to the settlement of boundary disputes. Furthermore, the *Virginia v. Tennessee* test is consistent with the purpose of the compact clause. It protects federal supremacy and at the same time permits the states the freedom to deal with their own affairs without the control of Congress. It represents a reasonable balance between states' rights and federal supremacy in our federal system. It should be followed by this court in determining the

validity of the Compact.

Application of the *Virginia v. Tennessee* test to the Compact clearly reveals that it is not the type of "compact or agreement" which requires congressional consent. The Compact does not involve any *17 shift of political power among the states and it does not encroach upon any area of federal supremacy. It consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in state and local taxation of multistate businesses.

The Compact has nothing to do with the subject matter of worldwide combined reporting, and even if it did, it could not interfere with the national interest and the conduct of foreign affairs. Any international treaty or agreement of the United States concerning any subject matter dealt with by the Compact would override the Compact provisions under the supremacy clause and leave the federal government free to deal with foreign affairs as it sees fit. Furthermore, there is nothing in the Compact that interferes with the sovereignty and revenue policies of nonmember states.

Thus, the *Virginia v. Tennessee* test as affirmed by this court in *New Hampshire v. Maine, supra,* upholds the validity of the Compact without congressional consent. Contrary to Appellants' argument, this case does not involve the question of whether or not the Compact is being administered properly. Appellants ask in their Complaint that the Compact be declared invalid on its face (A. 9) and do not contend that it "is being administered other than according to its terms. * * *" (Jur. St. App. A. 3a).

*18 II

The Compact is not unconstitutional since it has no real impact on interstate commerce. The enactment of uniform legislation by the member states in an area not acted on by Congress and provision for uniform administration of such legislation by the advisory function of the Commission does not interfere with Congress' power to regulate interstate commerce or place an unconstitutional burden on interstate commerce (Jur. St. App. A. 13a-20a).

"There is nothing inherent in the problems of multistate tax administration that would require federal regulation; nor has Congress yet identified these problems as a matter of peculiar federal concern." (Jur. St. App. A. 13a) "The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters does not create an impermissible burden upon interstate commerce." (Jur. St. App. A. 14a)

III

The classifications employed in the Compact applicable to Appellants and other multistate taxpayers "is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer", (Jur. St. App. A. 20a) and does not deny Appellants equal protection or due process of law (Jur. St. App. A. 15a-20a).

IV

In arguing that the Compact requires congressional consent, Appellants have pointed to no provision*19 of the Compact which requires congressional consent and ignore the test laid down by this court in *Virginia v. Tennes see, supra,* and which was established as controlling precedent by this court in *Wharton v. Wise,* 153 U.S. 155 (1894) and *New Hampshire v. Maine, supra.* Rather, Appellants rely on other tests of their own choosing and on what they claim is maladministration of the Compact. In support of this argument, Appellants rely on matters (1) which are without the record in this cause; (2) which are irrelevant and immaterial; (3) which have nothing to do with the administration of the Compact by the Commission; and (4) which are contrary to fact or are merely speculative. Since administration of the Compact is not the question at issue, Appellants' argument should be disregarded by this court. Furthermore, even if the Compact were being administered improperly, the Appellants would have ample remedies under state law to correct any errors that affect any of their

legal rights. Appellants are not champions of any rights of nonmember states or the federal government.

Appellants' arguments were fully discussed and answered by the lower court and its judgment should be affirmed by this court.

***20** THE ARGUMENT

I

UNDER THE COMPACT CLAUSE, ONLY THOSE AGREEMENTS OR COMPACTS WHICH TEND TO INCREASE THE POLITICAL POWER OF THE STATES IN A MANNER THAT ENCROACHES ON THE FEDERAL SUPREMACY REQUIRE CONGRESSIONAL CONSENT AND THE COMPACT IN QUESTION IS NOT SUCH AN AGREEMENT OR COMPACT.

A. The standard to determine the need for congressional consent to a compact or an agreement between states is whether it tends to increase the political power of the states in a manner which may encroach upon the just supremacy of the United States.

The issue of whether or not the Compact is invalid for lack of congressional consent involves an interpretation of Article I, § 10, clause 3 of the United States Constitution, which reads in material part:
"No State shall, without the Consent of the Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *"

This language was interpreted in the early case of *Virginia v. Tennessee,* 148 U.S. 503 (1893) as follows:
"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach ***21** upon or interfere with the just supremacy of the United States." (148 U.S. 519)

This interpretation was reaffirmed as the controlling test in *New Hampshire v. Maine, supra,* 426 U.S. 363 (1976), and has been quoted with approval in *Wharton v. Wise, supra,* 153 U.S. 155 (1894); *Sterns v. Minnesota ex rel. Marr,* 179 U.S. 223 (1900); and *Louisiana v. Texas,* 176 U.S. 1 (1900).

In *New Hampshire v. Maine, supra,* this Court affirmed the *Virginia v. Tennessee* test as follows:
"New Hampshire suggests, however, that acceptance of the consent decree without an independent determination by the Court as to the validity of the legal principles on which it is based would be a circumvention of the Compact Clause, Art. I, § 10, cl. 3. The premise of this argument is that the proposed settlement is an "Agreement or Compact" within the meaning of the Clause and thus requires the consent of Congress to be effective. We disagree.
"The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' *Virginia v. Tennessee,* 148 US 503, 519, 37 L Ed 537, 13 S Ct 728 (1893). Whether a particular agreement respecting boundaries is within the Clause will depend on whether 'the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.' Id., at 520, 37 L Ed 537, 13 S Ct 728. See ***22** *Wharton v. Wise,* 153 US 155, 168-171, 38 L Ed 669, 14 S Ct 783 (1894).
"The proposed consent decree plainly falls without the Compact Clause under this test. New Hampshire and Maine are not here adjusting the boundary between them; the boundary was fixed over two centuries ago by the 1740 decree, and the consent decree is directed simply to locating this already existing boundary. Accordingly, neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government. * * *" (426 U.S. 363)

Because of Appellants' argument that the test of *Virginia v. Tennessee, supra,* as affirmed by this court in *Wharton v. Wise, supra,* and *New Hampshire v. Maine, supra,* is of limited application, it might be well to examine the history of the compact clause.

Read literally, Article I, Section 10, Clause 3 of the Constitution of the United States could be interpreted to mean that all interstate compacts or agreements require the consent of Congress before they can come into operation. This is apparently the erroneous view of the Appellants (except for certain boundary disputes) which they seek to have this court adopt.

Holmes v. Jennison, et al., 39 U.S. (14 Pet.) 540 (1840), is cited in support of this interpretation. The issue in that case, however, was whether an extradition agreement between the governor of Vermont and a Canadian official violated the compact clause because it was entered into without congressional*23 consent. Chief Justice Taney announced that it did and that it made no difference whether the agreement was in writing or was merely a verbal understanding between the governor of Vermont and the Canadian official. But this did not involve a compact or agreement between states. Obviously, Vermont was encroaching upon federal supremacy in foreign affairs in dealing with Canada. Hence, *Holmes* is not support for the Appellants' rigid interpretation of the compact clause. As noted by one commentator:

"* * * It is understandable that greater circumspection should have been manifested in judging arrangements with foreign powers and arrangements between sister states, but this need not have led to a harsh construction of the compact clause. * * *"[FN3]

FN3. Engdahl, "Characterization of Interstate Arrangements: When is a Compact Not a Compact," 64 Mich. L. Rev. 63, 88 (1965).

The next case by the United States Supreme Court on the scope of the compact clause was *Virginia v. Tennessee, supra,* 148 U.S. 503 (1893), in which the court refused to apply to a compact between sister states the criteria stated for control of foreign affairs in Justice Taney's opinion in *Holmes, supra.*

Virginia v. Tennessee, supra, involved a boundary dispute. The two states had, by agreement, appointed commissioners to establish the boundary. The legislatures of each state ratified the boundaries as established by the commissioners. In discussing the implications of the compact clause, with respect *24 to this agreement, the court stated as follows at 148 U.S. 503, 517-519:

"Is the agreement made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

"There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit line of two States should cross some malarious through that State in that way. If the bordering and disease producing district, there could be no possible reason, on any conceivable public *25 grounds, to obtain the consent of Congress for the bordering States to

agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply? "We can only reply by looking at the object of the constitutional provision and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubts may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used. "*Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.* * * *"
(Emphasis added.)

The court later discussed the relation of the compact *26 clause to boundary disputes in particular (148 U.S. 503 at 520):
"* * * The compact or agreement will then be within the prohibition of the Constitution or without it, according as the *establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of Federal authority.* (Emphasis added)[FN4]

FN4. The emphasized language was quoted by this Court in *New Hampshire v. Maine, supra,* at 426 U.S. 363.

Shortly after the decision in *Virginia v. Tennessee, supra,* this Court in *Wharton v. Wise, supra,* 153 U.S. 154 (1894), was confronted with the question of the validity of a compact between Virginia and Maryland, entered into in 1785, under the Articles of Confederation. This compact dealt with the regulation of commerce, navigation and fishing, and the exercise of jurisdiction over the Potomac River.

Article VI of the Articles of Confederation had provided that no two or more states could enter into any treaty, confederation, or alliance without the consent of Congress. In determining that the compact between Virginia and Maryland was not one of the type which required such consent, the court quoted extensively from *Virginia v. Tennessee, supra,* and then concluded as follows:
"So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach *27 upon or weaken the general authority of Congress under those articles. * * *" (153 U.S. at 170)

Thus, while the *Virginia v. Tennessee* rule could be characterized as dicta, this court's reliance on that rule in deciding *Wharton v. Wise, supra,* and *New Hampshire v. Maine, supra,* established that rule as controlling law.[FN5] The *Virginia v. Tennessee* interpretation of the compact clause has been the guiding principle from which the courts have not deviated since in applying the compact clause, irrespective of the nature or subject matter of the compact under consideration.

FN5. And in fact, as stated by Engdahl, footnote 3, *supra,* at page 69: "* * * in every case since *Virginia v. Tennessee* in which an interstate arrangement has been challenged for lack of congressional consent, it has been held exempt from the consent requirement. * * *"

An excellent article analyzing the authorities pertaining to congressional consent is titled, "The Compact And Agreements of States With One Another and With Foreign Powers" and is contained in 2 Minn. L. Rev. 500-516. The author there concludes, in regard to the Compact Clause and comparable constitutional provisions:
"If we consider the history of these constitutional provisions together with the other provisions of the constitution which grant or limit authority, we are led to conclude that only political compacts or agreements which affected their (the states) sovereignty as between themselves or between them and the federal government were sought to be regulated or controlled.

"We realize that the support to be found for this proposition in the federal cases is largely dicta yet such dicta have been long standing and, so far as we can learn, have never been judicially criticized." (Material in parenthesis added, 2 Minn. L. Rev. 514.)

In "Desty's Federal Constitution," Second Edition (1879) at page 193, which predated *Virginia v. Tennessee, supra,* the author notes that the compact clause relates to agreements or compacts which are political. It is there stated:
"Such agreement or compact as is in its nature political * * * cannot operate as a restriction upon the powers of Congress under the Constitution. The prohibition is political, * * *"

Thus, interstate agreements in aid of state taxation have been held valid without congressional consent under the *Virginia v. Tennessee test.*

***28** In *Dixie Wholesale Grocery Company v. Martin,* 278 Ky. 705, 129 S.W.2d 181 (1939), a wholesale grocer sought an injunction to restrain the commissioner of Kentucky from prosecuting it under the state's cigarette stamp tax act. The plaintiff made sales to customers located in Ohio as well as in Kentucky, and attacked a regulation issued by the Kentucky commissioner, which required all cigarette dealers claiming exemption under the resale provision of the law to file with their cigarette tax returns the names and addresses of their out-of-state (Ohio) consignees of unstamped, and hence untaxed, cigarettes. This regulation had been issued in order to carry out an agreement, authorized by legislation between the Kentucky and Ohio taxing authorities, under which each had agreed to furnish the other the names and addresses of purchasers of unstamped cigarettes shipped to the latter state. The Kentucky court rejected the attack on the agreement as invalid under the compact clause for lack of congressional consent under the principle established by *Virginia v. Tennessee* that:
"* * * inhibition in this section only applies to political alliances which may encroach upon the supremacy of the United States. That opinion recites: 'There are many matters upon which different states may agree that can in no respect concern the United States'." (278 Ky. at 711, 129 S.W. 2d at 184)

This court denied certiorari, 308 U.S. 609 (1939).

***29** *Roberts Tobacco Co. v. Department of Revenue,* 322 Mich. 519, 34 N.W. 2d 54 (1948) involved an agreement similar to that involved in *Dixie Wholesale Grocery v. Martin, supra.* In upholding the constitutionality of the agreement, the court relied upon the *Martin* case and *Virginia v. Tennessee.*

Bode v. Barrett, 412 Ill. 204, 106 N.E. 2d 521 (1952), involved an Illinois motor vehicle tax for highway use. The act contained a reciprocity provision, under which the secretary of state was authorized to enter into agreements with other states to exempt their residents from the Illinois tax if the other states extended like treatment to Illinois residents. In rejecting the contention that the Illinois act and agreements reached thereunder violated the compact clause, the court first discussed *Dixie Wholesale Grocery v. Martin, supra,* and *Virginia v. Tennessee, supra,* and then concluded:

"Consideration of these and other pertinent authorities impels the conclusion that the Federal constitutional interdiction of 'interstate compacts' was written into the organic law of the land in order to protect a then nascent republic from such *ententes* among powerful States as would aggrandize their political power at the expense or the compromise of national sovereignty. *The provision does not inhibit those purely fiscal interstate agreements that facilitate interstate commerce and aid in execution of internal revenue policies. This is particularly true when such agreements conduce to, rather than restrain, commerce among the several states.*" (Emphasis added) (196 N.E. 2d at 536)

In affirming the decision of the Illinois Supreme Court, this court stated as follows:

***30** "We need notice only one other argument and that is that the statute requires Illinois residents to pay the tax, whereas nonresidents are exempted provided the states of their residence reciprocate and grant like exemptions to Illinois residents. * * * *And contrary to appellants' suggestions, that kind of reciprocal arrangement between states has never been thought to violate the Compact Clause of Art I, § 10 of the Constitution.* See St. Louis & S.F.R. Co. v. James, 161 US 545, 562, 40 L ed 802, 808, 16 S Ct 621; Kane v. New Jersey, 242 US 160, 168, 61 L ed 222, 227, 37 S Ct 30." (*Bode v. Barrett*, 344 U.S. 583 at 586 (1953)) (Emphasis added)

Most directly in point, the Compact itself has been held valid by three other courts in addition to the court below by reliance on the *Virginia v. Tennessee* test against claims that it required congressional consent.

In *Kinnear, et al. v. The Hertz Corporation*, 86 Wn. 2d 407, 545 P.2d 1186 (1976), the Supreme Court of Washington unanimously upheld the Compact against the same constitutional arguments raised here by the Appellants. The analysis of the constitutional questions by the Washington Supreme Court was similar to that employed by the three-judge court below. Federal district courts in Idaho and North Dakota have also upheld the Compact.[FN6]

FN6. In *Multistate Tax Commission, et al., Petitioner v. Sperry Rand Corporation,* Respondent, United States District Court for the District of Idaho, No. 1-75-168, by order dated October 26, 1976, the District Judge upheld the joint audit provisions of the Multistate Tax Compact here in question by granting Petitioners' motion for summary judgment. In *Dorgan, Petitioner v. International Business Machines Corp.*, Respondent, and *Dorgan, Petitioner v. International Harvester Co.*, Respondent, U.S. District Court for the District of North Dakota, Southwestern Division, Nos. A1-74-24 and A1-74-25, respectively, by order dated October 7, 1976, the District Court held that the Respondents were required to make their books and records available for audit by auditors of the Commission.

***31** Other types of interstate agreements not directly relating to the power of taxation have also been ruled valid under the *Virginia v. Tennessee* test without congressional consent:

(1) *Ham v. Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943), held that congressional consent was not required for a compact under which an interstate bridge authority was established;

(2) *State v. Doe*, 149 Conn. 216, 178 A.2d 271 (1962) held that congressional consent was not required concerning a Connecticut statute which authorized the state welfare commissioner to enter into reciprocal agreements with other states for interstate transportation of poor and indigent persons pursuant to the interstate compact on welfare services; and

(3) *Landes v. Landes*, 1 N.Y.2d 358, 135 N.E. 2d 562, 153 N.Y.S. 2d 14, appeal dismissed 352 U.S. 948 (1956) held that congressional consent was not required concerning the New York uniform support of dependents act and the California uniform reciprocal enforcement of support act.

Finally, in a decision which predated *Virginia v. Tennessee* and undoubtedly influenced that decision, the Georgia Supreme Court in Union Branch R.R. v. E.T. & Ga. R.R. Co., 14 Ga. 327 (1853) held that a compact between Georgia and Tennessee, which authorized construction of a railroad in the *32 two states, did not require congressional consent. The court stated in *Union Branch:*

"1. * * * in our opinion, this prohibition (the compact clause) applies only to such an 'agreement or compact' as is in its nature political; or more properly, perhaps, such as may, in any wise, conflict with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government.

"The framers of the Constitution clearly intended nothing more by this clause, than to prohibit the several States from exercising their authority in any way which might limit, or infringe upon a full and complete execution by the General Government, of the power's intended to be delegated by the Federal Constitution; because nothing more was to be gained by any further prohibition, no further benefit to the General Government could have been derived from it, and it would have been entirely superfluous and unnecessary.

"It was very proper and expedient, that no State should have been allowed to enter into any compact with another State or Foreign Government, which, by involving the exercise of powers parted with by the States, and belonging to the Federal Government, might operate seriously to embarrass that Government. But it could work no injury to the General Government, for such State to make an agreement with another State, or even a foreign power, which in no wise conflicted with the authority delegated to the General Government, and tended in no manner to embarrass that Government, in the full and complete exercise of its powers. Unless we take this view of the case, we must hold that a State, without the consent of Congress,*33 can make no sort of contract, whatever, with another State." (14 Ga. 339-340)[FN7]

FN7. Cf. Dover v. Portsmouth Bridge, 17 N.H. 200 (1845); Fisher v. Steele, 39 La. Ann. 447, 1 So. 882 (1887); McHenry County et al. v. Brady, 37 N.D. 59, 163 N.W. 540 (1917).

Not only have the courts followed the *Virginia v. Tennessee* test, but also Congress has followed this test in its debates over congressional consent to compacts or agreements between the states. This is illustrated by the debate as to whether or not the Southern Regional Educational Compact required congressional consent. It was contended on the floor of the Senate that congressional consent was not required under the test of *Virginia v. Tennessee, supra.*[FN8] The Compact was put into effect without congressional consent. In fact, the *Virginia v. Tennessee* test has been before Congress for a considerable number of years. A volume entitled, "Constitution of the United States of America, Revised and Annotated 1924" (Washington Government Printing Office 1924--68th Congress, 1st Session--Senate Document No. 154) which was distributed to each congressman as his "constitutional bible," laid down the following test at page 373:

FN8. 94 Cong. Record 5560, 5561, 5563, 5570, 5676, 5677, 5759, 5766 (1948).

"Such an agreement or compact as is in its nature political, or which may conflict with the powers delegated to the general government * * * cannot operate as a restriction upon the powers of Congress under the Constitution." (Citing among other cases *Virginia v. Tennessee, supra,* and *Wharton v. Wise, supra.*)[FN9]

FN9. A comparable test was set forth in the "Constitution of the United States of America" (Revised and Annotated 1938) U.S. Government Printing Office, Washington 1938--74th Congress, 2d Session. Senate Document No. 232 at pages 368-370. As there stated:

"Any agreement or compact which tends to the increase of the political power of the States or which may conflict with the powers delegated to the General Government * * * cannot encroach upon or interfere with the supremacy of the Federal Government, and so far as inconsistent with

the Constitution will be superceded by it."

This document was also distributed to each member of Congress as his "consitutional bible."

*34 In resolving the question of congressional consent, then, it is clear that the only established test is that contained in *Virginia v. Tennessee, supra,* and that test is whether a compact tends to increase the political power in the states in a manner which may encroach upon or interfere with the just supremacy of the United States.

Notwithstanding the extensive history of the *Virginia v. Tennessee* test, including its affirmance and application in *Wharton v. Wise, supra,* and *New Hampshire v. Maine, supra,* Appellants assert that the test in *Virginia v. Tennessee* is not here controlling and that it is limited to boundary disputes (Appellants' Br., 32) or that it is dicta (Appellants' Br., 12, 35).

The compact clause had its origin in the very practical problems which plagued the colonies before adoption of the constitution and which continued to plague the new states. These problems were, quite simply, the continuing controversies between the colonies and later between the states, often over boundaries.[FN10] During the colonial period, such controversies were settled by the Privy Council. With the formation of the new nation, a new mechanism had to be found to resolve these controversies which, during the *35 period of the Articles of Confederation, had "brought the states to the very verge of physical struggle" and were jeopardizing the existence of the new nation.[FN11]

FN10. For a general discussion of these controversies, and their relationship to the compact clause, see *Virginia v. West Virgina,* 246 U.S. 565 at 596-600 (1918).

FN11. *Virginia v. West Virginia, supra,* 246 U.S. at 598.

The solution embodied in the constitution was three-fold. As stated by this court:

"* * * the conferring on this court of original jurisdiction over controversies between the States, the taking away of all authority as to war and armies from the States and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against." *Virginia v. West Virginia,* 246 U.S. at 599.

Disputes between states necessarily involve a conflict between one state's claims of sovereign power and those asserted by another state. The disputes might involve conflicting assertions of state power over a geographical area, as in a typical border dispute; or they might involve claims over a river system, as in *Arizona v. California,* 373 U.S. 546 (1963). But whatever the subject matter of the dispute, the resolution necessarily involves the claims of one state receding--voluntarily or involuntarily--to accommodate those of another.

Where an accommodation between conflicting claims is worked out in voluntary agreement between the states involved in the dispute, that agreement might "* * * tend to increase and build the political influence of the contracting States, so as to *36 encroach upon or impair the supremacy of the United States * * *" *Virginia v. Tennessee, supra,* 148 U.S. at 518. In such a case, the resolution of the dispute must receive congressional consent.

The Compact, in contrast, is addressed to a completely different sort of problem. It does not even purport to readjust conflicting claims between the sovereign powers of different states; rather it simply represents a decision of the member states to utilize a common advisory agency in the exercise of one of their undisputed powers, i.e., to tax businesses such as those of the Appellants.

This court, in *Virginia v. Tennessee,* clearly recognized the distinction between cooperative agreements, such as the

Compact in question, which do not require congressional consent, and conflict-resolving agreements which might require consent. Thus, in *Virginia v. Tennessee,* this Court gave two examples of such cooperative agreements, each involving joint action to solve a common public health problem which did not require congressional consent. See 148 U.S. at 518. The Compact in question is conceptually no different.

Most importantly, this court in *Virginia v. Tennessee* recognized the need for flexibility in the states to enter into cooperative agreements for joint action, without congressional consent. It was recognition of this need which prompted the court to characterize a literal reading of the compact clause as "the height of absurdity," 148 U.S. at 518, and to set forth the test which has been used ever since.

*37 By construing the compact clause in the light of its historical purpose, as set forth in *Virginia v. West Virginia, supra,* and *Virginia v. Tennessee, supra,* this Court will preserve the flexibility which is required by the states under modern conditions.[FN12] Past history and present realities converge, and lead to the same conclusion.

> FN12. Should the Appellants be able to convince the Congress that the tax treatment they are receiving from one or more states, be they compact members or not, is not in the national interest, the Congress may well be empowered to take corrective action under the commerce clause. But if the states are to be constrained in their efforts to produce uniformity in state and local taxation of multistate businesses, it should be done by the Congress, as a matter of deliberate legislative choice, and not by this court as a matter of constitutional necessity.

In a further effort to distinguish *Virginia v. Tennessee, supra; Wharton v. Wise, supra;* and *New Hampshire v. Maine, supra,* Appellants argue that these cases have no application if a Compact "might affect subjects placed under the control of Congress." (Appellants' Br., 33, quoting from *Wharton v. Wise, supra,* 153 U.S. at 171)

But that quote does not support the Appellants' argument. Rather, it supports the position of Appellees. As noted by Dunbar, "Interstate Compacts and Congressional Consent," 36 Va. L. Rev. 753, 757 (1950), the language quoted from *Wharton v. Wise* (opinion written by Justice Field who wrote the opinion in *Virginia v. Tennessee*), supports the proposition that the states, in the exercise of powers reserved to them under the Constitution, are not always required to obtain congressional consent to exercise those powers by "agreement or compact." Appellants fail to recognize that the states have a *38 reserved power to deal with the subject of state taxation of multistate businesses in the absence of congressional legislation prohibiting such state action so long as the states do not exercise power forbidden by the commerce clause of its own force or effect. The compact in *Wharton v. Wise, supra* dealt with navigation rights on interstate waterways and the carrying on of commerce between the compact states over those waterways (153 U.S. at 163, 164). Thus, the compact in *Wharton v. Wise, supra,* dealt with an area which was clearly subject, under the Constitution, to congressional regulation. Justice Fields' statement pertaining to compacts which "might affect subjects placed under the control of Congress" (*Wharton v. Wise, supra,* 153 U.S. at 171) necessarily related to an area of *exclusive* congressional power, i.e., an area in which the states have no power to act even in the absence of congressional action. Otherwise, the compact in *Wharton v. Wise* would have been of the type which required congressional consent under the Constitution. Therefore, Appellants' argument that any compact dealing with interstate commerce requires congressional consent is in error.[FN13] The only compacts requiring congressional *39 consent then are those which deal with an area of exclusive federal authority or which affect the political balance among the states to the detriment of federal power.[FN14]

> FN13. The congressional consent compact cases referred to *supra* in this brief which were held valid without congressional consent dealt with the

subject matter of interstate commerce. *Dixie Wholesale Grocery Company v. Martin, supra,* 278 Ky. 705, 129 S.W. 2d 181, and *Roberts Tobacco Co. v. Department of Rev.*, 322 Mich. 519, 34 N.W.2d 54 (1948), dealt with interstate transportation of cigarettes; *Bode v. Barrett, supra,* 412 Ill. 204, 106 N.E.2d 521 (1952), aff'd 344 U.S. 583 (1953), pertains to the interstate use of motor vehicles; *Ham v. Maine-New Hampshire Interstate Bridge Authority, supra,* 92 N.H.268, 30 A.2d 1 (1943), *Union Branch R.R. v. E.P. & Ga. R.R. Co., supra,* 14 Ga. 327 (1853), and *Dover v. Portsmouth Bridge, supra,* 17 N.H. 200 (1845), were concerned with interstate transportation facilities; and *State v. Doe, supra,* 149 Conn. 216, 178 A.2d 271 (1962). and *Landes v. Landes, supra,* 1 N.Y.2d 358, 135 N.E. 2d 562 (1953), N.Y.S.2d 14, appeal dismissed, 352 U.S. 948 (1956), dealt with the interstate movement of persons for welfare and support payment purposes. *McHenry County v. Brady, supra,* 37 N.D. 59, 163 N.W.?? 540 (1917), dealt with an agreement in regard to an international drainage district. *Fisher v. Steele, supra,* 39 La. Ann. 447, 1 So. 882 (1887) upheld an interstate agreement for construction of a levee along the Mississippi River.

FN14. This critical distinction we here make was established by this court in the early case of *Cooley v. Board of Wardens of the Port of Philadelphia, et al.*, 53 U.S. (12 How.) 298, 13 L. Ed. 966 (1851). In *Cooley,* this court was confronted with the problem of whether or not the states had the power to regulate a subject of interstate commerce--port pilots--in light of the constitutional grant of power to Congress to regulate interstate commerce. This court held that the grant of power to Congress to regulate interstate commerce did not of its own force and effect deprive the states of power over interstate commerce. In upholding the power of the states to regulate port pilots in a manner affecting interstate commerce, this court concluded:

"We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate; * * *" (13 L. Ed. 1006)

Numerous decisions of this court hold that, within this court's guidelines and absent conflicting federal legislation, state taxation of multistate businesses is not a regulation of commerce within the purview of the commerce clause. *Northwest States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959). (See also *infra* pgs. 46-50)

The distinction we are making here was expressly recognized and applied by this court in *St. Louis & S.F.R. Co. v. James,* 161 U.S. 545 (1896). Involved in that case was an agreement between two states relating to regulation of an interstate railroad. This court stated:

"It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. ***40** Such legislation on the part of two or more States is not, *in the absence of inhibitory legislation by Congress,* regarded as within the constitutional prohibition of agreements or compacts between States." (Emphasis added) (161 U.S. 562)

Congress clearly had the power to pass "inhibitory legislation," for the subject matter of the legislation was an interstate railroad and interstate commerce. But until Congress did so, the states were free from the restrictions of the compact clause, and could work out a regulatory scheme of their own.

Thus, the history of the compact clause and the basic purpose for its inclusion in the Constitution of the United States dictates that the *Virginia v. Tennessee* test is controlling here.

B. The Compact does not increase the political power of the states or encroach upon the just supremacy of the United States.

The Compact leaves completely intact the individual member states' power over its sole subject matter, that of state and local taxes of multistate businesses. As found by the court below:

"Applying the test of *Virginia v. Tennessee* and *New Hampshire v. Maine, supra,* to the Compact here in issue, the Multistate Tax Compact does not increase the political power of the party states. The Commission is vested with no taxing authority; the taxes which it administers are only those imposed by the respective states and subdivisions in accordance with state law.

"Nor does the Commission have legislative power; it may propose model regulations where two or more party states or their subdivisions *41 have uniform or similar laws. Such proposals may be adopted, modified, or rejected by the duly authorized tax officials of the affected states.[FN6]

"The Commission does have the power to conduct audits, but only at the request of a party state or its subdivision. In aid of this power, the Commission is authorized to seek the compulsory process of courts having jurisdiction within the party states. The Commission does not have the authority to enforce any tax liability; that, too remains within the jurisdiction of the respective taxing authorities. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers.

FN6. Proposing model uniform legislation is a function performed by such organizations as the National Conference of Commissioners on Uniform State Laws, bar organizations and public interest groups. As with the proposals of such groups, the recommendation of the Commission may be persuasive, but the decision whether to enact the recommended legislation or regulations lies solely with those officials designated by each state's constitution and laws.

"The member states have ceded no sovereignty over tax matters to the Commission." (Jur. St. App. A, 11a-12a, 14a)

The Compact does not encroach upon or interfere with any federal power, including the power to regulate interstate commerce.

As also stated by the District Court below:

"Similarly, it is clear that the Compact does not encroach upon or interfere with federal supremacy. Although Congress may be constitutionally empowered by the Commerce Clause, *42Article I, § 8, clause 3, to legislate and regulate the interstate administration of state tax systems, Congress has yet to exercise this power. Plainly, this failure to act has not preempted the states' powers in the field of multistate tax administration. Since the states may act individually in this area, there is no greater encroachment upon the federal interest by their acting cooperatively. Notwithstanding this Compact, Congress could enact comprehensive legislation that would preempt the power.

"In *Virginia v. Tennessee, supra,* at 518, the Court observed that '(t)here are many matters upon which different states may agree that can in no respect concern the United States.' Although the problems of multistate tax administration might be a concern of federal interest, that concern has not been evidenced by legislation in this area. As yet, there are no federal statutes or expressed Congressional policies with which this Compact could interfere. In the event of federal preemption in the future, dependants must withdraw *pro tanto* in order that any such federal statute shall be supreme." (Jur. St., App. A, 12a)

Under the Compact, the member states administer their own tax laws and do not delegate any of their authority to anyone. Each state, independent of the Compact, has the power to adopt uniform legislation, to audit Appellants' books and records on its individual account, to grant multistate taxpayers certain options in the determination of their tax liability, and to enter into reciprocal joint audit

agreements with other states. By adoption of the Compact, each state has retained complete and absolute control over its own tax system. Furthermore, each state *43 has the inherent power to delegate audit responsibilities to a third party (Jur. St. App. A, 11a-12a).

The attempt by the legislatures of the member states to improve tax administration by creating the Commission as a purely advisory and recommendatory agency could not possibly alter the political balance among the states or between the states and the federal government.

Thus, the Compact and the implementation of its joint audit provisions are fully within the power and domain of the states. These provisions in no way shift political power among the states or encroach upon or interfere with the federal supremacy. Consequently, congressional consent is not required for their implementation. The federal government and the individual states retain the same power and the same supremacy with the Compact in force as they have without the Compact.

In sum, based upon the provisions of the Compact and their operative effect and based upon the uniform decisions of this court including *Virginia v. Tennessee, supra,* and *New Hampshire v. Maine, supra,* it is clear that the Compact does not require congressional consent for its validity.

In fact, there is a serious question as to whether the Compact is an "agreement or compact." The fact that it is called a compact is not controlling. As indicated in a comment entitled, "What Did the Framers of the Federal Constitution Mean By *44 'Agreements or Compacts'?" 3 U. Chi. L. Rev. 453 (1936), there is no reliable history in the constitutional convention proceedings or otherwise to indicate what was to be encompassed by the term "agreement" or "compact" as used in Article I, § 10, clause 3 of the Constitution of the United States. Clearly, the Compact in question does not impose any binding agreement on any state. Any state is free to join or withdraw from the Compact at will, as exemplified by the withdrawal of Illinois. The operative provisions of the Compact are merely reciprocal arrangements among the party states for their mutual benefit in administering their state tax laws as applied to multistate-multinational businesses.

While it is true that the advisory and recommendatory functions of the Compact are carried on through a Commission and the Compact is supported by legislation in the member states, the functions of the Commission could be just as well discharged by the tax administrators of the member states on an ad hoc basis without any formal agreement whatsoever. They certainly could provide for advisory regulations in the interpretation of uniform law such as that contained in UDITPA without any "compact" or "agreement" whatsoever.

Likewise, the states could enact the uniform legislation contained in the Compact and provide for joint audits of multistate taxpayers without the necessity for a "compact" or "agreement." This Court in *45 *Bode v. Barrett, supra,* 344 U.S. 583, 586 (1953) noted that, "* * * reciprocal arrangement between states has never been thought to violate the Compact Clause. * * *" Basically, this is at most all the Compact consists of. Its only added feature is cooperative administration of uniform state legislation which has never been hinted as constituting a binding compact or agreement by the states participating in such cooperative administrative action. Member states can act totally independent of the work and administration of the Compact by the Commission. They can participate as joint administrators in promulgating advisory regulations or in joint audits and completely ignore the results. In no manner or means is any action by the Commission binding in any way on any member state.

Under these facts, which cannot here be disputed, it is difficult to perceive the Compact in question as the kind of arrangement that is a "compact" or "agreement" within the intent of Article I, § 10, clause 3 of the United States Constitution. Certainly, this clause must refer to an arrangement, contractual in nature, that has some binding effect or contains binding obligations on the participants. Thus, the *Bode v. Barrett* test, wherein the court has held that reciprocal legislation is exempt from the congressional

consent requirement of Article I, § 10, clause 3, is precedent for holding that the Compact in question does not require congressional consent.

In fact, reciprocal legislation, such as that upheld*46 in *Bode v. Barrett* is more obligatory on the states participating in such legislation than is the Compact.

II

THE MULTISTATE TAX COMPACT DOES NOT ENCROACH UPON FEDERAL SUPREMACY IN THE AREA OF INTERSTATE COMMERCE BECAUSE IT DEALS WITH A SUBJECT MATTER LEFT EXCLUSIVELY TO THE DOMAIN OF THE STATES ABSENT ANY CONFLICTING FEDERAL LEGISLATION.

In the absence of congressional legislation on the subject, the states are free to impose their taxes on multistate businesses within the guidelines laid down by this Court. (*Cooley v. Board of Wardens of the Port of Philadelphia, et al., supra,* 53 U.S. (12 How.) 298, 13 L. Ed. 996 (1851). This Court has issued many decisions upholding the validity of state taxes imposed on multistate businesses against the claim that those taxes violate the Commerce Clause. All of those decisions refute Appellants' contention that the Compact is invalid because it deals with interstate commerce; and indeed, directly or indirectly, any tax (including property taxes) to some extent affects interstate commerce.

The fact that a business activity is the subject of regulation by the Congress does not preclude state taxation. As stated in *47*Polish National Alliance v. National Labor Relations Board*, 322 U.S. 643, 649 (1944):
"* * * federal regulation does not preclude state taxation and state taxation does not preclude federal regulation."

This principle was reaffirmed in *Federal Power v. Union Electric Company*, 381 U.S. 90 (1965), Footnote 7, in the following context:
"Utah Power & Light Co. v. Pfost, 286 US 165, cited by the Court of Appeals, is not opposed. The Court there held that a State had power to impose a tax on a company generating electric energy for distribution in interstate commerce. This, of course, does not control the commerce powers of Congress. Cf Edison Co. v. Labor Board, 305 US 197; Polish Alliance v. Labor Board, 322 US 643, 649: '(F)ederal regulation does not preclude state taxation and state taxation does not preclude federal regulation."' (381 US 95)

This Court has specifically held that state taxation of multistate businesses is not a regulation of interstate commerce. *Portland Cement Co. v. Minnesota and Williams v. Stockham Valves & Fittings, Inc., supra,* 358 US 450 (1959). In upholding the income taxes there under attack as applied to interstate businesses, the court noted that the taxes "* * * are not regulations [of interstate commerce] in any sense of that term" (bracket material interpolated) 358 US 461. In fact, the grant of power to Congress by the commerce clause to regulate interstate commerce does not withdraw from the states the authority to regulate such commerce with respect to matters *48 of local concern on which Congress has not spoken. *Parker v. Brown*, 317 US 341, 360 (1942).

If the states lack power to legislate in the area of state and local taxation of businesses engaged in interstate commerce except as permitted by Congress, all state and local taxation of Appellants and the class they purport to represent would be invalid. Thus, cases like the recent case of *Colonial Pipeline Co. v. Traigle, Collector of Revenue of Louisiana*, 421 U.S. 100 (1975) and *Complete Auto Transit, Inc. v. Brady*, ... U.S....., 51 L. Ed 2d 326, 97 S. Ct. 1076 (1977) would have been improperly decided.

In no sense can the advisory powers granted the Commission be construed as an unconstitutional regulation of interstate commerce. In specific reference to the controversy here, an audit in aid of the enforcement of a tax is no more a regulation of interstate commerce than the tax itself. Furthermore, a joint audit is no more a regulation of interstate commerce than individual audits by the states

participating in the joint audit.

The District Court properly analyzes the commerce clause argument of Appellants as follows:

"Plaintiffs next contend that the Compact violates the Commerce Clause in several respects. Plaintiffs' first contention in this regard is that Congress, under its power to regulate interstate commerce, has preempted the field. As we noted previously regarding the issue of encroachment upon federal supremacy, there has been no such federal preemption. It is now established that

***49** '* * * federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons-- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.' *Florida Lima & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963).

"See also *Merrill Lynch, & c. v. Ware,* 414 U.S. 117, 139 (1973). There is nothing inherent in the problems of multistate tax administration that would require federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern.

"Second, plaintiffs contend that the Compact imposes an undue and unreasonable burden upon interstate commerce. 'It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 254 (1938).' *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 108 (1975).

"Indeed, plaintiffs do not contend that the Commerce Clause bars imposition of the respective state taxes which the Commission is charged with administering for the benefit of member states. A necessary correlative of the power to impose taxes is the power to audit, and determine the tax liability properly for each taxpayer.

"The stated purposes of this Compact, ***50** *supra,* are to promote uniformity among state tax systems, ease taxpayer compliance and minimize the risk of duplicative taxation of the multistate taxpayer. Plaintiffs contend that the Compact promotes disparity, not uniformity. In support of this contention, plaintiffs argue that the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach. Plaintiffs further argue that the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states. *Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states.* That the Compact may promise more than it has as yet achieved is no ground for finding unconstitutionality. The member states have ceded no sovereignty over tax matters to the Commission. The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters, does not create an impermissible burden upon interstate commerce. This is so for at least two reasons: first, even without the Compact, the states could enact parallel or uniform tax legislation, as has been done with UDITPA itself; and second, any agreement between two or more states to observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results. In sum, we find no merit to the contention that the Compact is an unconstitutional burden upon interstate commerce." (Emphasis added) (Jur. St. App. A. 13a-15a)

***51** III

THE COMPACT IS NOT INVALID WITHIN THE PURVIEW OF THE COMMERCE, EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION BECAUSE THE COMPACT DOES NOT UNREASONABLY BURDEN INTERSTATE COMMERCE OR UNCONSTITUTIONALLY DISCRIMINATE AGAINST MULTISTATE TAXPAYERS.

The interstate commerce and Fourteenth Amendment (equal protection and due process) arguments of Appellants have been thoroughly demolished by the opinion

below.[FN15] (Jur. St. App. A 13a-20a) We believe that this opinion is so persuasive as to require little further argument.

> FN15. For all practical purposes, these arguments have been abandoned on this appeal. Clearly, the Compact should not be declared invalid under the commerce clause or Fourteenth Amendment because of alleged abuse by its executive director in his advisory role to the Commission and member states. (Appellants' Brief, 48-51)

Assuming, arguendo, that there are differences in the standards applicable to multistate taxpayers under the Compact and applicable to intrastate taxpayers under member state laws, various principles of constitutional law prevent Appellants from successfully relying on those differences to invalidate the Compact.[FN16]

> FN16. The lower court specifically held: "The different treatment, if any, accorded multistate taxpayers by the Compact is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer." (Jur. St. App. A 20a)

Appellants must establish that the alleged differences are significant and result in an actual or threatened injury which denies them constitutional rights. ***52** *Re* 620 Church Street Building Corp., 299 U.S. 24, 27 (1936); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 544, 545 (1914). *General Trading Co. v. State Tax Commission,* 322 U.S. 335, 338 (1944). A distinction in form is not sufficient. Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).

This court has upheld a variety of differences between state taxes as they pertain to multistate business as compared to intrastate businesses against the argument that these differences deny multistate businesses constitutionally protected rights. Appellees are aware of no decision of this court that has even hinted that administrative differences in determining the tax liability of multistate businesses, as compared to intrastate businesses, violate any federal constitutional rights of multistate businesses.

In *Henneford v. Silas-Mason Co.*, 300 U.S. 577 (1937), and in *Nelson v. Sears Roebuck & Co.*, 312 U.S. 359 (1941) this court noted that the methods used to collect taxes imposed upon multistate businesses there involved were different from those used to collect taxes imposed upon intrastate businesses. These differences were deemed immaterial by the court.[FN17] There is thus nothing in the commerce clause discrimination cases that would lend support to the ***53** argument that the differences between the Compact standards in relation to multistate taxpayers and member state standards in relation to intrastate taxpayers are significant under the commerce clause.

> FN17. In fact, this court has upheld tax statutes as nondiscriminatory as to interstate businesses so long as comparable taxes are imposed somewhere along the tax chain on intrastate businesses. *Hinson v. Lott,* 75 U.S. 148 (1869); *Gregg Dyeing Co. v. Query, supra; Henneford v. Silas-Mason Co., supra; Alaska v. Artic Maid,* 366 U.S. 199 (1961); *General American Tank Car Corp. v. Day,* 270 U.S. 367 (1926); *Cashey Baking Co. v. Virginia,* 313 U.S. 117 (1941); *Nelson v. Sears Roebuck & Co., supra.* In fact, the identical tax burden is not required to be placed on interstate businesses as compared to intrastate businesses. *General American Tank Car Corp. v. Day, supra; Alaska v. Artic Maid, supra.*

In order for Appellants to establish that the compact denies them equal protection or due process of the law, they must establish that multistate taxpayers cannot be classified differently from intrastate taxpayers. However, such classification is permissible unless it is arbitrary and capricious; and unless no imagined set of facts would justify the classification. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); *Madden v. Kentucky,* 309 U.S. 83 (1939); *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (1959).

Multistate businesses, by the very nature of their activities within a particular state, must of necessity be treated differently than purely local businesses. The problems involved in auditing a multistate-multinational corporation with national and international operations are vastly different from those involved in auditing the local grocery store. This alone disposes of the argument that the compact denies Appellants equal protection or due process of law. The differences applicable to intrastate taxpayers as compared to interstate taxpayers are based on a reasonable classification. The reason is that they rest on "some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins v. Riley*, 268 U.S. 137, 142 (1925))

***54** The important consideration here is that under the compact multistate taxpayers and intrastate taxpayers retain the same substantive rights concerning state and local taxation. *Metropolitan Co. v. Brownell*, 294 U.S. 580 (1935); *American Motors Insurance Co. v. Starnes*, 425 U.S. 637 (1976). There is no claim here that they have not.

In sum, as found by the three-judge court below, the Appellants' commerce clause, due process clause and equal protection clause arguments are totally lacking in merit.

IV

FURTHER ANSWERING APPELLANTS' POINTS

A. Introduction

We have shown above:

1. The rule of *Virginia v. Tennessee* is not dictum but is the law of this land as ruled in *New Hampshire v. Maine*. (*Supra*, pp. 21-22)

2. The rule of *Virginia v. Tennessee* applies to any and all agreements between the several states and not just to boundary agreements. (*Supra*, pp. 27-40)

3. The rule of *Virginia v. Tennessee* requires that Appellants demonstrate that the agreement tends to increase the political power of the combining states and encroaches upon or interferes with the just supremacy of the United States. (*Supra*, pp. 20, 25)

4. Appellants have made no such showing and ***55** indeed the contrary is true; the Compact at bar does not increase the political or any other power of any or all of the member states and there is no encroachment upon or interference with any supremacy, just or otherwise, of the United States. (*Supra*, pp. 3-5, 40-46)

5. The Compact does not in any wise interfere with or impede interstate commerce and involves local taxation only in areas left exclusively to the respective states. (*Supra*, pp. 46-50)

6. The Compact does not in any wise deny equal protection or due process to Appellants or anyone else, nor does it burden, unreasonably or otherwise, interstate commerce. (*Supra*, pp. 51-54)

The Appellants have abandoned any effort to convince this Court that any provision of the Compact on its face requires congressional consent for its validity. They rely instead on what they represent as facts concerning its administration. Appellants have also abandoned any effort to show that this purported administration of the Compact requires congressional consent because it increases the political power of the states or because it encroaches upon federal supremacy. Rather, the Appellants contend that if the administration of the Compact has some effect on or interference with the interest of the nation or nonmember states, it requires congressional consent and that it is up to Congress to determine this (Appellants' Br. 12, 34, 35). Appellants then argue by reference to matters completely without the record and by broad sweeping conclusions, not ***56** supported by any authority and contrary to fact, that the Compact is a regional effort of the western states and

that its administration interferes with the interest of nonmember states and the federal government (Appellants' Br. 11, 35-47).

They center this argument on what they purport to be the rules and practices of the Commission in regard to "combined reporting" and "full apportionment of nonbusiness income" (Appellants' Br. 25-28, 35-46). Since neither the Compact nor the rules and practices of the Commission provide for "combined reporting" or "full apportionment of nonbusiness income" and since the Commission has no power to fix or determine any tax liability of any multistate taxpayer or any policy for any state, this argument is (a) irrelevant, and (b) lacks any foundation in law or fact. The Commission simply does not have any power to affect or interfere with the interest of the nation or nonmember states.

Similarly, a great deal of the Appellants' Brief consists solely of argument intended to discredit the Compact, the Commission and its work in the eyes of this Court. They assert that:
"The adoption of rules or practices which conflict with the laws of the member states appears to be a recurrent custom of the Commission." (Appellants' Br. 29)

This argument, too, is (a) irrelevant and (b) lacks any foundation in law or fact. It is irrelevant because administration of the Compact is not at issue; and it lacks any possible factual or legal *57 foundation because the rules and practices of the Commission are not binding on any state and therefore could not conflict with the law of any state. The Commission simply has no power to fix or determine the tax liability of any multistate taxpayer. Not surprisingly, Appellants have not cited a single case in which the rules and practices of the Commission have been found to be violative of state law.

These introductory comments are intended to apprise the Court of the irrelevancy and lack of any possible factual or legal foundation for most of Appellants' argument. In constitutional cases, such as this, this Court has consistently rejected unsupported assertions of fact and hypothetical arguments to invalidate state laws under the Constitution of the United States. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).[FN18] It should do so in the instant case.

> FN18. The District Court below placed Appellants' argument here in the appropriate context as follows:
> "No contention is made that the Compact is being administered other than according to its terms, except as to particulars governed by the substantive tax law of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.
>
> "Certain of the issues of fact which Plaintiffs would seek to raise are purely hypothetical and speculative. As to these issues, Plaintiffs have not 'set forth specific facts showing there is a genuine issue for trial' Rule 56(a) F.R.Civ.P. Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here. although they may be of academic interest 'to the various states in determining whether to join or continue membership in the Compact." (Jur. St. App. A. 3a)

Though the Appellants' argument is wholly irrelevant in determining the validity of the Compact on its face, we do wish to point out, however, some serious misstatements and arguments of Appellants.

*58 B. In arguing that the Compact requires congressional consent, the Appellants ignore the test laid down in Virginia v. Tennessee, supra, as affirmed by this court in Wharton v. Wise, supra, and New Hampshire v. Maine, supra, and contrary to those cases assert that all modern compacts require congressional consent which assertion would result in an unwarranted shift of power to Congress.

Appellants in substance are arguing that all compacts or

agreements among the states which deal with subject matters of general interest require congressional consent (Appellants' Br. 12, 19-20, 32-35). In the Appellants' view, it is immaterial that a compact or agreement is purely an advisory arrangement and deals solely with administrative matters pertaining to a subject of direct concern only to member states and pertaining solely to powers reserved to the member states under the Constitution of the United States. Thus, Appellants argue that all interstate arrangements of the states, however informal and advisory, require a shift of political power from the states to the Congress.

Appellants' construction of the compact clause would have far-reaching effect and would be destructive of any kind of cooperative effort by the states to produce uniformity and to prevent avoidance of just taxes by multistate taxpayers. This is particularly so when it is realized that a compact or agreement within the purview of the compact clause need not be reduced to writing or constitute a formal arrangement*59 among the states (*Holmes v. Jennison, et al.*, supra, 39 U.S. (14 Pet.) 540 (1840)), and when it is realized, as indicated at length in the Appellants' Brief, that Congress does not play a passive role in giving its consent to a compact or agreement among the states. In the case at bar, Appellants are saying that the tax administrators of the member states of the Compact cannot confer together concerning common problems, agree on joint audits of multistate-multinational taxpayers and issue recommendations in the form of advisory rules and regulations without the control and consent of Congress. Thus, according to Appellants' view, each state must "go it alone" in resolving problems of state and local taxation of multistate businesses or they must deal with these problems as they arise from time to time only after receiving congressional consent. Certainly, this could not be the intent of the constitutional restraint on compacts.

Twenty-four states under the auspices of the Commission have entered into reciprocal exchange agreements for the exchange of information concerning taxpayers.[FN19] Under the Appellants' view of the compact clause, this agreement standing alone would require congressional consent. If several states should agree that they would conduct cooperative (joint) audits of selected multistate taxpayers, Appellants would require that such agreement be given congressional approval and that Congress could prescribe the *60 rules or guidelines for such audits. On March 8, 1977, the Executive Officer of the Franchise Tax Board of the State of California, Mr. Martin Huff, and the Director of the Oregon Department of Revenue, Mr. John Lobdell, entered into just such an agreement. Since both California and Oregon follow the unitary concept and worldwide combination in imposing taxes on or measured by net income, Appellants argue that Congress could prevent them from doing so in reference to any joint audit pursuant to such an agreement, although each state individually could do so. This is of course what Appellants are arguing in regard to the joint audit program of the Commission.

FN19. Ninth Annual Report of the Multistate Tax Commission (1976), Appendix B, pp. 24-25.

Under Appellants' reasoning, the National Association of Tax Administrators could not function without congressional consent. This organization has a permanent staff. It is financed by the member states; and from time to time recommends that the states take particular actions in regard to any subject of general concern involving state and local taxation. A committee of this organization proposed uniform regulations for the Uniform Division of Income for Tax Purposes Act. At the Forty-Fourth and Forty-Fifth Annual Meeting of the National Association of Tax Administrators, the status of the United States-United Kingdom Income Tax Treaty and congressional foreign source income proposals were discussed and were a subject matter of resolutions by that body at those meetings. These resolutions oppose the proposed treaty limitations on state taxing power. Under Appellants' reasoning, any such concerted*61 action by state tax administrators would be characterized as interference with foreign commerce and therefore invalid because it has not been recommended by an interstate agency which has received the consent of Congress.

In the tax field alone, there are numerous organizations of the states which deal with the same subject matters that are

dealt with by the Commission. These organizations discuss common interstate taxation problems and propose rules and regulations or legislative action for their solution. They have at least as great or greater potential impact on federal policies or the interest of nonmember states as does the Commission. Yet, their constitutional validity has never been challenged.

The unwarranted and far-reaching effect of Appellants' construction of the Compact Clause lends validity to the test of *Virginia v. Tennessee, supra,* and the recent affirmance of that test in *New Hampshire v. Maine, supra,* to resolve the question of when congressional consent is require for any agreement or compact among the states.

C. Appellants erroneously contend that the Compact is a regional effort which interferes with the national interest and the interests of nonmember states. (Appellants' Br. 35-47).

Assuming, arguendo, that this Court were to abandon the *Virginia v. Tennes see, supra,* test and require congressional consent for compacts which, *62 in the Appellants' words, "interfere" with the national interest or the sovereignty (i.e. tax policies) of nonmember states, it is clear that the Compact does not so "interfere."

Appellants argue that the Compact interferes with the conduct of foreign affairs (Appellants' Br. 32-42) because "combined reporting" which is utilized for the purposes of state taxation by some states is not utilized by the federal government for federal income tax purposes. Since no provision of the Compact requires "combined reporting," this argument of Appellant lacks any factual or legal foundation.

Next, Appellants argue that the Compact has a serious impact on interstate commerce (Appellants' Br. 42-44) because "combined reporting" ("unitary business") and the apportionment of non-business income may result in multiple taxation and in increased costs of compliance. Since the Compact does not require combined reporting and since Article IV of the Compact specifically provides for the allocation of nonbusiness income, this argument of Appellants likewise lacks legal or factual foundation.

Appellants then argue that the Compact interferes with the sovereignty and revenue policies of the nonmember states (Appellants' Br. 45-47) because "combined reporting" and the apportionment of nonbusiness income deprives nonmember states of their ability to offer tax incentives to selected businesses. Since Article IV of the Compact specifically provides for the allocation of nonbusiness income and the Compact does not require combined reporting, this *63 argument also lacks any legal or factual foundation.

The foregoing illustrates the complete fallacy of the Appellants' argument that the *Compact* interferes with the national interest or the interest of the nonmember states. The most serious defect in Appellants' argument is the gap between what the Compact provides for in accordance with its terms and what the Appellants attribute to the Compact. The only provision of the Compact which has any bearing on Appellants' argument is Article IV which contains the Uniform Division of Income for Tax Purposes Act. Where any state adopts this Act, whether or not a member of the Compact, its adoption would have no effect on foreign affairs and no adverse impact on interstate commerce or the tax policies of nonmember states which Appellants erroneously attribute to the Compact. Therefore, it is not the Compact itself which is the subject matter of Appellants' complaints, but rather, UDITPA.

Though wholly irrelevant, we will now turn to a more detailed analysis of the specific elements of the Appellants' argument.

1. Appellants' assertion that the Compact is a regional effort of the western states which conflicts with the interests of nonmember states is not in accordance with the history of the Compact.

The Appellants assert that the Compact is a regional effort of the western states which adversely affects the interests

of nonmember states. This argument is contrary to the history of the Compact and ignores the fact that a majority of the states are *64 either regular or associate members of the Compact. In addition to its regular members, the Compact has thirteen associate members consisting of the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee and West Virginia.[FN20]

FN20. Ninth Annual Report of the Commission (1976), pp. XIV-XVI. Associate membership has been by designation of the governors of the associate member states and entitles the states to full participation in the activities of the Commission except voting and officer privileges.

An examination of the history of the Compact reveals that it was and is an effort by *all* the states to produce greater uniformity, certainty and equity and ease of compliance burdens in state and local taxation of multistate taxpayers.[FN21]

FN21. First Annual Report of the Commission (1968), pp. 1-2; Revenue Administration, National Association of Tax Administrators, Thirty-Fourth Annual Conference, Chicago, Illinois (1966), pp. 15-20; P.H. State and Local Taxes; All States Unit, para. 5100.

This Court should thus reject the Appellants' assertion that the Compact is a regional effort of some tax administrators which has a detrimental impact on nonmember states. All of the states participated in its formation and agree with its fundamental purposes of achieving greater uniformity, certainty, ease of compliance and equity in state and local taxation of multistate businesses. There is absolutely no provision of the Compact that has a regional bias. Once the constitutionality of the Compact is firmly established by this Court, it is anticipated that many nonmember states will become members. It is to their interest and the interest of the Nation for them to do so.

*65 2. The Appellants erroneously argue that the Commission has issued invalid regulations calling for full apportionment of nonbusiness income of multistate-multinational taxpayers, contrary to state law and traditional practices. (Appellants' Br. 13, 26-27, 46,48)

While not material in determining the validity of the Compact on its face and the need for congressional consent, Appellants place in issue the validity of the Commission regulations pertaining to the Uniform Division of Income for Tax Purposes Act (Article IV of the Compact) and contend that these regulations are not in accordance with law and alter traditional patterns of taxing income from intangible properties by the state of commercial domicile (Appellants' Br. 13, 26-27, 46).

The Appellants' argument that the Commission regulations require full apportionment of nonbusiness income is defective for at least four reasons: (1) it is totally irrelevant and immaterial; (2) if the regulations are invalid and are adopted by any state, the Appellants and other multistate taxpayers have adequate remedies under state law to prevent the application of these regulations to them; (3) the regulations do not provide for apportionment of nonbusiness income; and (4) traditional practice has not been to assign all income from intangibles to the commercial domicile of the taxpayer.

Appellants' assertion that all income from intangible properties has traditionally been allocated to the commercial domicile for state income tax *66 purposes (Appellants' Br. 26) is refuted by the "Willis Report." Volume 1 of that Report,[FN22] pages 197-232, deals with the problem of specific allocation of income and deductions therefrom by state practices at the time of the Report. The report noted on page 198:

FN22. Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, 88th Cong., 2nd Sess., HR 1480 (1964).

"On the basis of the methods which they used to determine what income is specifically allocable, the States may be divided into three groups: (a) those which rely solely on an itemization of the particular types of income to be specifically allocated; (b) those which distinguish between business income and nonbusiness income; and (c) those which distinguish between unitary business income and other income."[FN23]

FN23. Because of the wide variety of practices and inconsistencies in the specific allocation of items of income, including those from intangible properties, and because of the problems associated with determining the deductions from income attributable to specifically allocated income items, the Willis Subcommittee recommended full apportionment of all income. (The Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, House Report No. 952, 89th Cong., 1st Sess., p. 1144)

In an Indiana survey,[FN24] in answer to the question, "Does your state (ever) include dividends in the apportionment base?" 31 states answered "yes."

FN24. The State of Indiana conducted a survey to determine state progress toward uniformity. It published the results in a report entitled, "Results of a Survey of the Uniformity of State Tax Laws by the State of Indiana," dated February 15, 1977. This report is referred to several times in this brief and is reproduced as Supplement A to this brief.

Interestingly, the Willis Report indicates:
"* * * it should be noted that New York also distinguishes between 'business income' and 'investment income.' However, in New York 'investment income' is not specifically allocated but is apportioned by a formula based upon the amount of investment capital employed in that *67 State." (Vol. 1 of the "Willis Report," 88th Cong., 2nd Sess., HR 1480 (1964), p. 199)[FN25]

FN25. Case authority also supports the proposition that income from intangible properties have been apportioned as part of unitary or business income. See *International Harvester v. Department of Tax.*, 322 U.S. 435 (1944), and *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940) (upholding the apportionment of income from dividends against the payor corporation based on its in-state activities); *Appeal of U.S. Steel Corp.*, Appeal No. 73-I-20 (Idaho B.T.A. Nov. 1, 1973), and *Appeal of Capital Southwest Corp.*, CCH Cal. Tax Rep. para. 204-881 (S.B.E. Jan. 16, 1973) (wherein the Boards respectively upheld dividends and interest income as business or unitary income). In addition, see *Montgomery Ward & Co. v. Commissioner of Tax.*, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Tax.*, 272 Minn. 403, 138 N.W.2d 612 (1965), appeal dismissed, 384 U.S. 718 (1966) (wherein the courts held that interest income was business income subject to apportionment). Cf. *F. W. Woolworth Co. v. Director of Div. of Tax*, 45 N.J. 466, 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958); and *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972) (in which dividend income was subject to apportionment either as business income or part of the unitary income of the payee corporation).

In determining the significance of investments to the overall business operations, this court aptly noted in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911):
"Nor can it be justly said that investments have no real relationship to the business transacted by a corporation. The possession of large assets is a business advantage of great value; is may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in

> many ways give it business standing and prestige." (220 U.S. 166)

Appellants further erroneously conclude that the Commission regulations do not provide for the apportionment of nonbusiness income.[FN26]

> FN26. Section 1 of Article IV of the Compact (Jur. St. App. E. 58a) defines nonbusiness income as all income other than business income and defines business income as
> "Income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."
>
> The regulations of the Commission implement this language (Reg. IV.1, Seventh Annual Report of the Commission, pp. 64-69).
>
> The regulations contain examples of nonbusiness income subject to specific allocation. For example, Reg. IV.1.(c) (4) Example (vi) reads:
> "The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are nonbusiness income." (Seventh Annual Report, Multistate Tax Commission (1974), Appendix J, p. 68)

*68 Nor is there merit to the Appellants' wholly irrelevant argument that the Commission's UDITPA regulations are invalid (Appellants' Br. 27, 48). In so arguing, the Appellants have not directed the Court's attention to any provision of UDITPA or any provision in the regulations or to any case authority interpreting UDITPA.[FN27]

FN27. In support of this argument, they rely instead on cases set forth in footnote 22 (p. 26) and articles cited in footnotes 43, 44 (p. 27) and 68 (p. 48) of their brief. The cases relied upon are not UDITPA cases. Three of the four articles relied upon are not directed to the question of whether or not the UDITPA regulations of the Commission are valid and the fourth article does not analyze the regulations in reference to the UDITPA language and case authority.

The article of the Executive Director of the Commission referred to in footnote 43 and the article of the Commission's general counsel referred to in footnote 68 do not support the propositions for which they are cited. The Commission's staff has never taken the position that the Commission's UDITPA regulations are invalid in any respect or require full apportionment of nonbusiness income.

The fact, as indicated by the Indiana survey (footnote 24, supra; Supplement A), that eighteen states have adopted UDITPA regulations which substantially conform to the Commission's regulations, support their validity.

Furthermore, the courts that have dealt with the question of what constitutes business versus nonbusiness income under UDITPA (Article IV of the Compact) do not disagree with the Commission's regulations because they generally hold that all income which a taxpayer derives from its integrated unitary business operations constitutes business income if the income arises out of activities, or is used, in the regular course of business. See, for example, *Champion International Corp. v. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (1975), and *Sperry & Hutchinson v. Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974).

From the foregoing, it is clear that Appellants' efforts to raise a congressional consent issue concerning the Commission's regulations implementing UDITPA lacks support in fact. Furthermore, if the regulations in fact provided for full apportionment of nonbusiness income contrary to UDITPA and changed the traditional rule of assigning income from intangibles to the commercial domicile, this does not invalidate the Compact.

*69 3. The Appellants erroneously argue that the Commission has adopted rules and practices for combined reporting (Appellants' Br. 12, 25-26) and that this interferes with the national interest in the conduct of foreign affairs (Appellants' Br. 35-42 and the sovereignty and revenue policies of nonmember states (Appellants' Br. 45).

The Appellants advance the argument that the Commission has adopted rules and practices on worldwide combination which are contrary to international practice, United States treaty commitments, and federal principles, and have provoked complaints from many of our treaty partners (Appellants' Br. 12-13) and thus interferes with foreign affairs (Appellants' Br. 32-35). Since the Commission has no power to fix or determine the tax liability of any taxpayer for any state on any basis whatsoever; since the Commission has adopted no combined reporting rules and has no uniform practice in regard to combined reporting (either domestic or worldwide); and since there is no international practice or established federal policy concerning worldwide combination for state tax purposes, the Appellants' argument concerning the Compact's alleged interference with national or international affairs is in error.

No treaty which has been ratified by the Senate forbids any state from determining the income of a multinational corporation by application of worldwide combination principles. Thus, there is no conflict between federal treaties and worldwide combination.*70 If there were, the treaty provisions would control. The only regulations issued by the Commission are those pertaining to the division of income under Article IV of the Compact (UDITPA) which do not provide for "combined reporting."[FN28] *71 In reference to combined reporting these regulations only provide:

FN28. If the Appellants were correct in their contention, which they weave throughout their argument pertaining to the "congressional consent" question, that the Commission has adopted rules and regulations pertaining to the "combined reporting" and "unitary" concepts, we fail to see how this would invalidate the Compact on its face. These are concepts approved by the judiciary and indeed found to be necessary to properly apportion the income of multistate-multinational corporations to the respective states. See *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271 (1924); and *Butler Bros. v. McColgan*, 17 Cal. 2d 664, 111 P.2d 334, aff'd 315 U.S. 501 (1942); *Edison California Stores v. McColgan*, 30 Cal.2d 472, 183 P.2d 16 (1947); *Superior Oil Company v. Franchise Tax Board*, 34 Cal. Rptr. 545, 386 P.2d 33 (1963). For a recent discussion on "combined reporting" see Frank M. Keesling, "A Current Look at the Combined Report and Uniformity in Allocation Practices" 42 *Journal of Taxation* 106 (Feb. 1975). Cf. "Multinational Corporations and Income Allocation under Section 482 of the Internal Revenue Code," 89 Harvard L. Rev. 1202.

If Corporation A manufactures a product which it sells to a sales subsidiary Corporation B and Corporation A and B are so interrelated in their business affairs that the separate profits of Corporation A cannot be determined apart from Corporation B and vice versa, it is perfectly logical and necessary to combine Corporation A and B to determine the true income of either Corporation A or Corporation B. Should the results arrived at by this court in *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271 (1924) be any different if the brewing of ale in England was by a parent and its activities in New York were

conducted by a subsidiary corporation?

The Indiana Survey (footnote 24, Supplement A, asks the following question: "Are there any situations in which your state goes beyond the corporate shell to consider the unitary corporate business in determining the income tax base? (That is, are there any situations in which your state takes into consideration activities of related corporations in determining the income tax of a corporate taxpayer?)" This survey indicates that 31 states answered the question "yes," including eastern states such as New York and the District of Columbia.

The only question in "combined reporting" is whether or not tax consequences should be different if a unitary trade or business is carried on under one corporate umbrella or several corporate umbrellas. Compare *Butler Bros. v. McColgan, supra* with *Edison California Stores v. McColgan, supra.*

The report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives in House Report No. 952, 89th Cong. 1st Sess., at page 1154, noted that:
"Often corporations which are controlled directly or indirectly by the same interests are so mutually dependent on each other for their success that the books of an individual corporation cannot accurately reflect the corporation's contribution to the profitability of the entire multicorporate enterprise."

It then recommended at page 1155 of the same report that:
"State tax administrators be allowed to require consolidation in any case where two or more corporations are affiliated by common ties of more than 50 percent of stock ownership and at least one of the affiliates has realty or an employee in the State."

"If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in Article IV or in these regulations shall preclude the use of a 'combined report' whereby the entire business income of such trade or business is apportioned in accordance with Article IV.9. to Article IV.17."[FN29]

FN29. Seventh Annual Report of the Multistate Tax Commission (1974), p. 69, Reg. IV.2.(b)(2).

Neither has the Commission adopted any particular practice in regard to combined reporting. In conducting joint audits for member states, the Commission auditors audit in accordance with the guidelines given to them by the tax officials of the member states. If a member state requests that an audit be prepared in accordance with the combined method of reporting (either domestic or worldwide), this method is employed by the Commission auditors for that state. On the other hand, if a member state requests that the Commission auditors furnish it information on the basis of separate accounting or the unitary concept without combined reporting, the Commission auditors follow such guidelines.[FN30]

FN30. Appellants state, "During Appellants' limited discovery, it was determined that the combined reporting and full apportionment rules of the Commission have been applied in dozens of multistate and multinational audits, involving large sums of money and as many as eleven states at one time." (Appellants Br. 28-29) What Appellants fail to reveal is that items of income were specifically allocated for some states and liability was determined for other states on the basis of separate accounting or the unitary concept without combination.

If administration of the Compact were at issue (which it is not), it is thus clear that administration *72 of the Compact

by the Commission in regard to "combined reporting" does not interfere with the national interest in foreign affairs or the sovereign and revenue policies of nonmember states.

4. Though totally irrelevant, Appellants erroneously argue that "combined reporting" is not a valid workable concept for the division of income.

Appellants spend considerable effort in their brief to convince this Court that combined reporting is a bad and unworkable concept (Appellants' Br. 36-37, 41-43, 45).[FN31] But, this Court has already overruled such a contention in regard to the unitary concept. *Butler Bros. v. McColgan, supra,* 315 U.S. 501 (1941). Combined reporting is simply the application of the unitary concept to determine the income tax liability of a taxpayer whose business operations are so integrated with affiliated corporations that both the taxpayer and affiliated corporations have to be treated as an economic unit for division of income tax purposes. This application of the unitary concept is directed to the problem noted *73 by this Court in *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 133 (1920);

> FN31. Appellants fail to discuss problems associated with the "arms-length" concept employed in Section 482 of the Internal Revenue Code. A law review note entitled, "Multistate Corporations and Income Allocation Under Section 482 of the Internal Revenue Code," 89 Harv. L. Rev. 1202, *supra,* contains an in-depth discussion of the Section 482 approach (separate accounting) as compared to the combined reporting (unitary) approach to the division of income problems. This article belies the simplistic approach Appellants use in their Brief to discuss these questions. Furthermore, as indicated in the law review note, Section 482 adjustments and combined reporting are simply different methods to determine what income of a multinational corporation is properly attributable to United States sources. The note further indicates that in actual practice, the Internal Revenue Service and the Courts have resorted to "combination" or unity concepts in applying Section 482 of the Internal Revenue Code.

"The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sales in another state * * * The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted in its borders." (254 U.S. 120, 121)[FN32]

> FN32. The need for "combined reporting" under this test, on the international level, can be illustrated by an actual example of a multinational corporation conducting unitary operations in Canada and Idaho through two subsidiary corporations. The Canadian subsidiary processes pulp used for the manufacture of paper by the American subsidiary. The pulp is transported from the Canadian subsidiary to the American subsidiary by a pipeline crossing international boundaries. Under these circumstances, it is impossible to separate the profits of the Canadian subsidiary from that of the American subsidiary because the profits of the two corporations from the manufacture of pulp and paper products were earned by a series of transactions beginning in Canada and ending in sales in Idaho. Thus, logic dictates that "combined reporting" be utilized to determine the profits of either of these two subsidiaries.

But whether or not combined reporting is good or bad is totally irrelevant.[FN33] The fact that the Commission staff believes it to be a valid and workable concept for the attribution of income and some member states have adopted combined reporting as a matter of state policy has nothing to do with the validity of the Compact. If the states insist on its use and the federal government believes that it conflicts with federal policy, the federal government has ample power to deal with this question.

FN33. Appellants on page 38 of their Brief infer that the proposed United States-United Kingdom Tax Treaty prevents worldwide combination by the states. It does so only in regard to United States subsidiaries of foreign United Kingdom parent corporations. It does not prevent worldwide combination of a domestic United States parent with its worldwide affiliated corporations. No audit conducted by the Commission on behalf of any member state has combined the income of a foreign parent with a domestic subsidiary. Furthermore, this treaty establishes no federal principle or treaty commitment until ratified by the United States Senate.

*74 D. The Appellants' argument that the Compact has a serious impact on and burdens interstate commerce (Appellants' Br. 42-44, 48) and interferes with the sovereignty and revenue policies of the nonmember states (Appellants' Br. 45-47) erroneously attributes nonuniformity to the Compact and constitutes a rehash of Appellants' erroneous arguments concerning "combined reporting" and "full apportionment of nonbusiness income."

In arguing that the Compact has a serious impact on or burdens interstate commerce (Appellants' Br. 42-45, 48), Appellants assert that the unitary concept and the apportionment of nonbusiness income subjects interstate businesses to burdensome multiple taxation and interferes with the national interest in promoting low-cost efficient interstate business.

This argument of Appellants is replete with many invalid assumptions. As heretofore indicated the Compact has nothing to do with the subject matter of combined reporting (See *supra,* p. 62) and the Commission has issued no rules and has adopted no uniform practice concerning combined reporting (See *supra,* pp. 69-72). Furthermore, as heretofore indicated, Article IV of the Compact (UDITPA) specifically provides for the allocation of nonbusiness income as do the rules and regulations of the Commission (See *supra,* p. 67). Since the only provision of the Compact that has anything *75 to do with this argument of Appellant is the language of UDITPA (Article IV of the Compact), unless the adoption of the uniform UDITPA language by the states (members and nonmembers of the Compact) interferes with the national interest in promoting interstate commerce, there is absolutely no validity to or factual or legal support for Appellants' commerce clause argument. Obviously, the adoption of uniform legislation promotes rather than interferes with interstate commerce.

The fact that the Compact has achieved significant uniformity in the field of state and local taxation of multistate businesses and thus promotes interstate commerce is also borne out by the Indiana survey. This survey, appended as Supplement A to this brief, shows startling results. This survey was conducted to determine what progress the states have made in the last ten years (the life of the Compact) toward uniformity and state taxation of multistate businesses. While it cannot be ascertained what role the Compact standing alone played in this progress toward uniformity, the Compact undoubtedly had a significant role. In light of these results and the uniformity inherent in the Compact itself, Appellants' assertion that the Compact and Commission produce confusion, inefficiency, inconsistent tax determination and multiple taxation (Appellants' Br. 13-14) is totally unfounded.[FN34]

FN34. This assertion of Appellants is completely unsupported by the record and is immaterial since taxpayers have no constitutional rights under the commerce clause to be protected from these alleged results. Furthermore, this argument of Appellants is inconsistent with its assertion that the Compact is transforming state taxation of multistate businesses. (Jur. St. App. A. 14a)

*76 It is therefore respectfully submitted that the Compact promotes the national interest under the commerce clause and does not interfere with or burden interstate commerce.

Neither does the adoption of uniform legislation in the Compact interfere with the sovereignty and revenue policies of nonmember states. No provision of the Compact or action of the Commission precludes other states from adopting any revenue policies consistent with their own laws and constitutional guidelines.[FN35]

> FN35. The Appellants' argument that the Compact interferes with the sovereignty and revenue policies of nonmember states is refuted by the Thirteenth Resolution of the National Association of Tax Administrators at its Forty-Fifth Annual meeting at Williamsburg, Virginia, on June 3, 1977, wherein NATA resolved without dissent: "* * * that the National Association of Tax Administrators does not believe, that as a matter of policy in its present form the Multistate Tax Compact interferes with the sovereignty and the revenue policies of the nonmember states."

E. The Appellees' Response to Miscellaneous Arguments and Misstatements of the Appellants.

We have heretofore dealt with the major themes of the Appellants' argument indicating why, in our opinion, they have nothing to do with the validity of the Compact on its face and generally with the operations of the Compact by the Commission. Furthermore, we have pointed out some of the misstatements, erroneous conclusions and conjectures on which these major themes are based. By a few examples, we wish to further demonstrate here the conclusionary, conjectural and erroneous nature of the Appellants argument.

The Appellants depict the Commission as an *77 independent commission or body (Appellants' Br. 12-12, 14, 20, 30, 32, 34). Appellants never explain what they mean by "independent." The Commission is simply composed of the tax administrators of the member states and does not operate independently of those states. The Commission confers no power upon them. Any power they exercise as a result of participation in the deliberations and recommendations of the Commission is the power they derive as being the tax administrators of their respective states. It is highly misleading for the Appellants to attribute any independent power to the Commission or to refer to it as an independent body when that is squarely in conflict with the Compact. The Commission, in order to accomplish anything, is completely dependent upon subsequent action by the states. It is individual state action and not the Compact or Commission, which is the subject matter of Appellants' complaints.

On pages 28 and 30 of their Brief, the Appellants infer that the Commission has a large staff to carry out its work "with more staff and greater powers than many of the commissions subjected to congressional review." The Commission staff at the time this litigation started consisted of an executive director, clerical staff in the Boulder office and three auditors. It has since added six auditors (three of those in the last six months) and one attorney. There is absolutely no support in the Appellants' Brief or record in this cause that such staff is larger than or that the Commission has greater powers than *78 many of the commissions subjected to congressional review.

Contrary to Appellants' assertions throughout their Brief, the staff personnel are not the Compact nor its Commission. They do not establish the advisory policies or recommendations of the Commission. It is thus error for the Appellants to refer to statements of the staff as representing the policy of the Commission or that they have anything to do with Compact. For example, the Commission staff's statements referred to on page 25 of Appellants' Brief, footnote 40, do not constitute a policy of the Commission or a statement of its practices.

Further, the Appellants in their Brief take staff statements out of context and cite them in support of statements in the Brief which they do not support. For example, Appellants assert:

"But the Commission has adopted rules and practices calling for full apportionment of the non-business income of multistate and multinational taxpayers."

and cite in support thereof the statement of the Executive Director of the Commission pertaining to full apportionment on page 47 of the Commission's Seventh Annual Report (1974) (Appellants' Br. 27). The quoted statement is from a paper entitled, "Attribution of Corporate Income Among Different Jurisdictions for Tax Purposes" which did not discuss the rules or practices of the Commission.

*79 As a further example, Appellants misrepresent the facts by asserting that Commission representatives have indicated that the Commission's UDITPA regulations are inconsistent with UDITPA (Appellants' Br. 48). In support of this statement, they cite the law review article written by the Commission's general counsel entitled, "Taxation of Income from Intangibles to Multistate-Multinational Corporations," 29 Vand. L. Rev. 401 (1976). The Commission's general counsel did not discuss the validity of these regulations in that article.

In other portions of the Appellants' Brief, the Appellants refer to matters that have nothing to do with the Compact, its operations or its staff. For example, on pages 37-38 and 40-41 of the Appellants' Brief, Appellants discuss the "permanent establishment" jurisdictional test which they erroneously commingle and confuse with the "arms length" standard of Section 482 of the Internal Revenue Code.

The "permanent establishment" jurisdictional standard has absolutely nothing to do with the Compact or any activity whatsoever of the Commission or its staff. The Compact does not contain any jurisdictional standards for imposition of any state or local taxes.

The deceptive nature of the Appellants' argument is illustrated by the Appellants' reference on page 40 of their brief to the Report of the Task *80 Force on Foreign Source Income of the House Committee on Ways and Means. They there infer that the report discusses the Compact in conjunction with the unitary business concept. That report does not tie the Compact to the unitary concept and only mentions the Compact in passing.

It would serve little purpose here to analyze further the lack of logic or support for the "argument" contained in the Appellants' Brief. This argument is full of misstatements and conjecture which have nothing to do with the validity of the Compact on its face or its administration. It should be ignored by this Court in resolving the questions at issue.

VI

CONCLUSION

The Appellants in their Amended Complaint (A. 2-10) ask that the Compact be declared invalid on its face and that its Commission be disbanded because they erroneously assert (1) the Compact is invalid without congressional consent; and (2) the Compact contravenes commerce clause limitations and denies Appellants Fourteenth Amendment and Fourth Amendment guarantees under the Constitution of the United States. Since the compact legislation of the member states is presumed to be constitutional, and since the Compact contains a severability clause, the Appellants have the burden to demonstrate to this Court what provisions, if any, of the Compact contravene these constitutional limitations.

The three-judge court below carefully analyzed *81 the issues raised in the Amended Complaint and held the Compact valid in all respects. (Jur. St. App. A, 1a-21)

The basic issues raised by Appellants on appeal are (1) whether the *Virginia v. Tennessee* test correctly sets forth the standard for determining when congressional consent is required for any compact or agreement among the states; and (2) whether the Compact is valid under this test. Appellants would limit the application of the *Virginia v. Tennessee* test to boundary agreements or dicta (Appellants' Br. 12) and assert that it has no application to what they term "modern complex compacts" (Appellants' Br. 34).

In regard to their argument that the *Virginia v. Tennessee* test is limited to boundary disputes or is dicta, decisions of this Court and other courts, as well as congressional consideration, have never so limited its application. It is thus apparent that the *Virginia v. Tennessee* test has been given much wider application than that contended for by Appellants. This is not surprising inasmuch as the *Virginia v. Tennessee* test involves a fundamental and timeless understanding of the proper relationship between the Nation and the states. It was evolved to reconcile the powers delegated to the federal government under the Constitution of the United States with the powers reserved to the states under that document. It has stood the test of time and to our knowledge has been consistently applied in all the ***82** congressional consent compact cases and otherwise. Appellants have set forth no reasons in their brief why this Court should now abandon that test.

Wherefore, it is respectfully submitted that this Court affirm the judgment of the three-judge district court below.

***83** SUPPLEMENT A

RESULTS OF A SURVEY ON THE UNIFORMITY OF STATE LAWS BY THE STATE OF INDIANA

(February 15, 1977)

Summary

A questionnaire on the degree of uniformity of tax law among the states was sent in October 1976 to all fifty states and the District of Columbia. A one hundred per cent response rate was achieved, although not until nearly three months after the original request for information--causing a slight delay in the original timetable for compilation of the results. The data presented here is based on representations made by the states in response to the questionnaire itself as well as to follow-up telephone conversations.

The results of the survey were very encouraging. We believe that on the basis of the information assembled it is reasonable to conclude that the present degree of uniformity, with respect to sales, use, and corporate income (or franchise) taxes, is considerable. Furthermore, it does appear that there has been a substantial increase in uniformity over the last decade.

All states with corporate income taxes, for example, now use some sort of mathematical formula to determine what corporate income is to be attributed where. Most but not all states also did so ten years ago. But twice as many states (25) as ten years ago now have adopted the Uniform Division of Income***84** for Tax Purposes Act (UDITPA) without significant modification or revision. More importantly, only six of those states with corporate income taxes now employ an apportionment formula *not* substantially similar to an equally-weighted three factor formula. In other words, 39 of 45 states use an equally-weighted three factor formula--indeed persuasive evidence of uniformity among the states. And two other states have tax laws substantially in accord with UDITPA, except that one has eliminated the sales factor while the other gives it double weight.

Perhaps of even greater significance, however, is the evidence that considerable uniformity now exists with respect to the interpretation of tax laws. The results of this survey indicate that *eighteen* states now use regulations interpreting UDITPA which substantially conform with those proposed by the Multistate Tax Commission.

Most of our other findings corroborate this conclusion of substantial and increased uniformity among the states:

Corporate income (or franchise) taxes

Most states (38) distinguish between income subject to allocation and income subject to apportionment; most of those states (28) employ a "business/non-business" criterion to make that distinction.

Most states (31) now include dividends in the apportionment base under some circumstances.

Most states (31) consider the unitary corporate business in determining the income base, at least in some situations.

***85** Thirty-eight states admit to sharing income tax information with other states or organizations.

Most states (36) use federal taxable income in determining the tax base; only 20 did so ten years ago.

Forty-two states allow the federal asset depreciation range, while only 29 did so ten years ago.

Fifteen states assign audits to an outside organization or participate in cooperative audits (all are full voting members of the Multistate Tax Commission); no states did so ten years ago.

Sixteen states now require corporations to account for all out-of-state sales, property, and payroll on a state-by-state basis, either by return or audit-- more than double the number that did so ten years ago.

Sales and use taxes

Most states (42) allow credit against use tax liability on purchases other than vehicles for sales tax due and paid in other states; only 32 states did so ten years ago.

Thirty-five states accept the Uniform Sales and Use Tax Exemption Certificate sponsored by the Multistate Tax Commission. No such certificate existed ten years ago.

Twenty-three states recognize and comply with the Uniform Sales and Use Tax Jurisdictional standard of the Multistate Tax Commission. No such standard existed ten years ago.

Twenty-eight states furnish information to ***86** otherd states regarding out-of-state purchasers who claim exemption from sales tax in those states.

The questions and the compiled information follow. The answers to open-ended questions have not been compiled because of major differences among the states in the quality of responses.

1(A). Does your state use a mathematical formula to determine what income of a corporate business is to be attributed to your state for tax purposes?

YES: 45 NO: 0 N/A: 6

1(B). Had it done so 10 years ago?

YES: 35 NO: 2 N/A: 13

2(A). Has your state enacted UDITPA (The Uniform Division of Income for Tax Purposes Act) without significant modification or revision?

YES: 25 NO: 20 N/A: 6

2(B). Had it done so 10 years ago?

YES: 12 NO: 26 N/A: 13

3(A). Has your state adopted regulations interpreting UDITPA which substantially conform with those proposed by the Multistate Tax Commission (first proposed September 1971, revised February 1973)?

YES: 18 NO: 8 N/A: 25

3(B). If so, when did your state adopt these regulations? (First proposed September 1971, revised February 1973)

4(A). If your state has not enacted UDITPA, is its apportionment formula substantially similar*87 to a formula employing the equally-weighted factors of sales, property, and payroll?

YES: 14 NO: 6 N/A: 31

4(C). When did your state adopt this formula?

*88 TABLE I

State	1A	1B	2A	2B	3A	3B	4A	4C
Alabama.	YES	YES	YES[FN1]	NO	YES[FN1]	1974	N/A	N/A
Alaska.	YES	YES	YES	YES	YES	1972	N/A	N/A
Arizona.	YES	YES	NO	NO	N/A	N/A	YES[FN2]	1954
Arkansas.	YES	YES	YES	YES	YES	1974	N/A	N/A
California.	YES	YES	YES	YES	YES	1972	N/A	N/A
Colorado.	YES	YES	YES	NO	YES	1976[FN3]	N/A	N/A
Connecticut.	YES	YES	NO	NO	N/A	N/A	YES[FN4]	1967
Delaware.	YES	YES	NO	NO	N/A	N/A	YES[FN5]	1958
District of Columbia.	YES	YES	YES	YES	NO	N/A	N/A	N/A
Florida.	YES	N/A[FN6]	NO	N/A[FN6]	N/A	N/A	NO[FN7]	1971
Georgia.	YES	YES	NO	NO	N/A	N/A	YES[FN8]	1968
Hawaii.	YES	YES	YES	NO	NO	N/A	N/A	N/A
Idaho.	YES	YES	YES	YES	YES	1973	N/A	N/A
Illinois.	YES	N/A[FN9]	YES	N/A[FN9]	NO	N/A	N/A	N/A
Indiana.	YES	YES	YES	YES	YES	1972	N/A	N/A
Iowa.	YES	YES	NO	NO	N/A	N/A	NO	1934

Kansas.	YES	YES	YES	YES	YES[FN10]	N/A	N/A	N/A
Kentucky.	YES	YES	YES	YES[FN11]	YES	1971	N/A	N/A
Louisiana.	YES[FN12]	YES	NO	NO	N/A	N/A	YES[FN13]	1948
Maine.	YES	N/A[FN14]	YES	N/A[FN14]	YES	1976	N/A	N/A
Maryland.	YES	YES	NO	NO	N/A	N/A	YES[FN15]	1939
Massachusetts.	YES	YES	NO	NO	N/A	N/A	NO	1975
Michigan.	N/A[FN16]	N/A[FN16]	N/A[FN17]	N/A	N/A	N/A	N/A	N/A
Minnesota.	YES	YES	NO	NO	N/A	N/A	YES[FN18]	1939
Mississippi.	YES	YES	NO	NO	N/A	N/A	YES[FN19]	1954
Missouri.	YES	YES	YES	NO	YES	1975	N/A	N/A
Montana.	YES	YES	YES	NO[FN20]	YES	1976	N/A	N/A
Nebraska.	YES	N/A[FN21]	YES	N/A	YES	1974	N/A	N/A
Nevada.	N/A[FN22]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire.	YES	N/A[FN23]	NO[FN24]	N/A	N/A	N/A	YES[FN24]	1969
New Jersey.	YES	YES	NO	NO	N/A	N/A	YES[FN25]	1946
New Mexico.	YES	NO	YES	NO[FN26]	YES	1973	N/A	N/A
New York.	YES	YES	NO	NO	N/A	N/A	NO	1975
North Carolina.	YES	YES	YES	NO[FN27]	YES[FN28]	N/A	N/A	N/A

North Dakota.	YES	YES	YES	YES	YES	1972	N/A	N/A
Ohio.	YES	N/A[FN29]	NO[FN29]	N/A[FN29]	N/A	N/A	YES[FN29]	1971[FN29]
Oklahoma.	YES	NO	NO	NO	N/A	N/A	YES[FN30]	1941
Oregon.	YES	YES	YES	YES	YES	1971	N/A	N/A
Pennsylvania.	YES	YES	YES[FN31]	NO[FN32]	NO[FN33]	N/A	N/A	N/A
Rhode Island.	YES	YES	NO[FN34]	NO	N/A	N/A	YES[FN34]	1947
South Carolina.	YES	YES	YES[FN35]	YES	NO	N/A	N/A	N/A
South Dakota.	N/A[FN36]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee.	YES	YES	YES[FN37]	NO	NO[FN38]	N/A	N/A	N/A
Texas.	N/A[FN39]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Utah.	YES	YES	YES	NO[FN40]	YES	1972	N/A	N/A
Vermont.	YES	YES	NO	NO	N/A	N/A	YES[FN41]	1966
Virginia.	YES	YES	YES[FN42]	YES	NO	N/A	N/A	N/A
Washington.	N/A[FN43]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia.	YES	N/A[FN44]	NO[FN45]	N/A	NO[FN46]	N/A	NO[FN45]	1967
Wisconsin.	YES	YES	NO	NO	N/A	N/A	NO	1971
Wyoming.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

FN1. Alabama's corporate income tax statute is vague on how the state is to determine what portion of a corporation's income is to be attributed to the state for tax purposes. On September 6, 1967, the Alabama Legislature enacted the Multistate Tax Compact, which includes UDITPA, subject to congressional enactment of a Multistate Tax Compact

Consent Bill. On September 12, 1967, the Alabama Department of Revenue promulgated regulations which adopt the UDITPA provisions as the basis on which to determine the amount of a corporation's income which is attributable to a state. Subsequently, Alabama has also substantially adopted the regulations interpreting UDITPA proposed by the Multistate Tax Commission.

FN2. While Arizona does allow use of an equally-weighted three factor formula, it also permits formulas employing more factors, or various combinations of factors. Arizona law mentions the separate accounting method first, and assigns taxing officials considerably more discretionary power than does UDITPA.

FN3. Colorado has been using the MTC regulations unofficially since 1973. They were officially adopted as of October 15, 1976.

FN4. Connecticut's law differs from UDITPA in that its property factor is based on average net book value. Connecticut also attributes all sales to the state of destination.

FN5. There are numerous differences between UDITPA and the Delaware tax formula.

FN6. Florida enacted its corporate income tax in 1971.

FN7. Florida's corporate income tax is substantially in accord with UDITPA, the major difference being a double-weighting of the sales factor by Florida.

FN8. Georgia is sometimes considered to be a UDITPA state, but its payroll and sales factors are substantially different.

FN9. The Illinois Income Tax Act was not enacted until 1969.

FN10. The regulations proposed by the Multistate Tax Commission are generally followed by Kansas, but have not been formally adopted.

FN11. Kentucky adopted UDITPA in 1966, effective in 1967.

FN12. Louisiana provides two methods for determining Louisiana net income, the apportionment method and the separate accounting method. A mathematical formula is used under the apportionment method.

FN13. There are numerous differences between UDITPA and Louisiana's apportionment formula.

FN14. Maine enacted its corporate income tax law in 1969.

FN15. Maryland's apportionment formula differs significantly from UDITPA in that sales are attributable to the state

where secured or negotiated, a feature that could result in double taxation.

FN16. Michigan does not now have a corporate income tax. In 1976 its corporate income tax was replaced by a "Single Business Tax," which does not use corporate income as a taxable base. Michigan's corporate income tax was originally enacted in 1967.

FN17. Michigan was a UDITPA state, while it had a corporate income tax.

FN18. Minnesota allows an equally-weighted three factor formula, but it also provides for weighted factors, single factor formulas, and the separate accounting method in some cases.

FN19. Mississippi uses three factors, but the property factor is limited to manufacturing or selling assets, the labor factor to manufacturing or selling payrolls and sales are assigned to the state in which the sale is actually consummated.

FN20. UDITPA was adopted into Montana regulations on January 1, 1967. It subsequently became a part of Montana statutes for years ended on or after December 31, 1973.

FN21. Nebraska adopted UDITPA in October 1967.

FN22. Nevada has no corporate income tax.

FN23. New Hampshire had no corporate income tax prior to its Business Profits Tax, effective January 1, 1970.

FN24. New Hampshire does not allocate any of the income of a corporation. It is sometimes considered a UDITPA state, as its formula is not substantially different.

FN25. There are numerous differences between UDITPA and New Jersey's apportionment formula. The three factor formula has been used since 1946 in determining New Jersey's tax base. Changes have been made in the formula for the allocation of receipts, with the other factor formulas remaining the same. The present formula was adopted in 1967.

FN26. UDITPA became effective in New Mexico on January 1, 1967.

FN27. North Carolina enacted UDITPA in 1967.

FN28. North Carolina has adopted regulations proposed by the National Association of Tax Administrators (NATA), which are substantially similar to those proposed by the Multistate Tax Commission.

FN29. Ohio adopted an income base for its corporate franchise tax in 1971. The alternative base, Ohio net book worth,

was adopted in 1902. The apportionment of the net income base generally follows UDITPA.

FN30. Oklahoma's law is similar to UDITPA in several respects, enough so that it is sometimes considered a UDITPA state.

FN31. Pennsylvania departs from UDITPA in that its statutes contain a provision for sales to be attributed to the state of destination. As an administrative rule, however, Pennsylvania utilizes the "Throw out Rule" (that is, sales into non-nexus states are thrown out of both the numerator and the denominator of the formula) when the sales factor is deemed to be disproportionate to the property and/or payroll factor percentages.

FN32. Pennsylvania's present corporate tax was adopted in 1971.

FN33. Pennsylvania's adopted and proposed regulations have used the MTC's proposed regulations as a reference. These regulations have been adopted and proposed piecemeal since 1975

FN34. Rhode Island does not allocate any corporate income; all income is apportioned by the three factor formula. All sales are attributed to the state of destination.

FN35. South Carolina employs the throwback rule for sales into states without a corporate income tax, as well as for sales into states in which the seller lacks situs.

FN36. South Dakota has no corporate income tax.

FN37. Tennessee has slightly modified the sales factor to include sales on a destination basis only, as contrasted with UDITPA, which employs a "throwback" rule for sales not taxable in another state.

FN38. Tennessee has indicated that the MTC regulations will be proposed for adoption in that state.

FN39. Texas has no corporate income tax.

FN40. Utah enacted UDITPA January 1, 1967.

FN41. Vermont is not considered a UDITPA state primarily because it apportions sales on an origin basis--a significant departure from UDITPA which could result in double taxation of out-of-state sales.

FN42. There are several minor differences between UDITPA and Virginia's corporate income tax. Nevertheless, Virginia is widely regarded as a UDITPA state. The major difference is that Virginia does not use the "business/non-business" criterion for distinguishing between allocable and apportionable income.

FN43. Washington has no corporate income tax.

FN44. West Virginia's Corporate Net Income Tax was established in 1967.

FN45. West Virginia has adopted the MTC regulations in part.

FN46. West Virginia's formula is substantially similar to UDITPA, but it has eliminated the sales factor, leaving a two factor formula.

*92 6(A). Does your state distinguish between income subject to apportionment by formula and income subject to apportionment by allocation in determining where corporate income is to be attributed for tax purposes?

YES: 38 NO: 7 N/A: 6

Primarily a business/non-business distinction (B/NB): 28
Primarily a criterion other than business/non-business: 10

(B). If so, what is the basis for the distinction, i.e., what are the criteria for determining *93 whether income is allocable or apportionable?

N/A: 13

7(A). Does your state (ever) include dividends in the apportionment base?

YES: 31 NO: 14 N/A: 6

8(A). Are there any situations in which your state goes beyond the corporate shell to consider the unitary corporate business in determining the income tax base? (That is, are there any situations in which your state takes into consideration activities of related corporations in determining the income tax of a corporate taxpayer?)

YES: 31 NO: 14 N/A: 6

9(A). Do you (ever) require corporations to account for all out-of-state sales, property, and payroll on a state-by-state basis (either by return or during audits)?

YES: 16 NO: 29 N/A: 6

(B). Did you do so ten years ago?

YES: 7 NO: 31 N/A: 13

*94 TABLE II

State	6A	6B	7A	8A	9A	9B
Alabama.	YES	B/NB	YES	NO	NO	NO

Alaska.	YES	B/NB	YES	YES	YES	NO
Arizona.	YES	OTHER	YES[FN1]	NO	NO	NO
Arkansas.	YES	B/NB	YES	NO	YES	NO
California.	YES	B/NB	YES	YES	YES	YES
Colorado.	YES	B/NB[FN2]	YES[FN3]	YES	YES	NO
Connecticut.	YES	B/NB	YES	NO	NO	NO
Delaware.	YES	OTHER	NO	NO	NO	NO
District of Columbia.	YES	B/NB	NO	YES	NO	NO
Florida.	NO	N/A	NO	YES	NO	N/A[FN4]
Georgia.	YES	OTHER	NO	YES	YES	YES
Hawaii.	YES	B/NB	NO	NO	NO	NO
Idaho.	YES	B/NB	YES	YES	NO	NO
Illinois.	YES	B/NB	YES	NO[FN5]	NO	N/A[FN6]
Indiana.	YES	B/NB	YES	YES	YES	YES
Iowa.	YES	B/NB	YES	YES	YES[FN7]	NO
Kansas.	YES	B/NB	YES	YES	YES	YES
Kentucky.	YES	B/NB	NO	YES	YES	YES
Louisiana.	YES	OTHER	NO	YES	NO	NO
Maine.	YES	B/NB	YES	YES	NO	N/A[FN8]
Maryland.	YES	OTHER[FN9]	YES	NO	YES	YES
Massachusetts.	NO	N/A	YES	YES	NO	NO
Michigan.	N/A	N/A	N/A	N/A	N/A	N/A
Minnesota.	YES	B/NB	YES	YES	NO	NO
Mississippi.	YES	B/NB	NO	YES	NO	NO
Missouri.	YES	B/NB	YES	YES	YES	NO
Montana.	YES	B/NB	YES	YES	YES	YES
Nebraska.	YES	B/NB	YES	YES	NO	N/A[FN10]
Nevada.	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire.	NO	N/A	YES	NO[FN11]	YES	N/A[FN12]
New Jersey.	NO	N/A	YES	NO	NO	NO
New Mexico.	YES	B/NB	YES	YES	YES	NO
New York.	NO	N/A	YES	YES	NO	NO

North Carolina.	YES	B/NB	YES	YES	NO	NO
North Dakota.	YES	B/NB	YES	YES	YES	NO
Ohio.	YES	OTHER	NO	YES	NO	N/A[FN13]
Oklahoma.	YES	OTHER	NO	YES	NO	NO
Oregon.	YES	B/NB	YES	YES	NO	NO
Pennsylvania.	YES	B/NB	NO	NO	NO	NO
Rhode Island.	NO	N/A	NO	NO	NO	NO
South Carolina.	YES	OTHER	NO	NO	NO	NO
South Dakota.	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee.	YES	B/NB	YES[FN14]	YES	NO	NO
Texas.	N/A	N/A	N/A	N/A	N/A	N/A
Utah.	YES	B/NB	YES	YES	NO	NO
Vermont.	NO	N/A	NO	NO	NO	NO
Virginia.	YES	OTHER	YES	YES	YES	NO
Washington.	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia.	YES	B/NB	YES	YES	NO	N/A[FN15]
Wisconsin.	YES	OTHER[FN16]	YES	YES[FN17]	NO	NO
Wyoming.	N/A	N/A	N/A	N/A	N/A	N/A

FN1. Dividends are included in the apportionment base only to the extent that they exceed interest expense.

FN2. Colorado also permits corporations to use a two factor formula, sales and property. The two factor formula uses criteria other than the "business/non-business" distinction to determine whether income is allocable or apportionable.

FN3. If dividends are business income, they will be included in the apportionment base of Colorado's three factor formula (UDITPA). Colorado's two factor formula, however, directly allocates dividends.

FN4. Florida enacted its corporate income tax in 1971.

FN5. Illinois previously used the unitary or combined method of apportionment in appropriate circumstances for taxable years ended prior to November 1, 1975.

FN6. Illinois enacted its corporate income tax in 1969.

FN7. Corporations are required to account only for all out-of-state sales on a state-by-state basis, since Iowa employs a one factor formula based on sales.

FN8. Maine enacted its corporate income tax in 1969.

FN9. Maryland uses the "business/non-business" criterion in addition to several other criteria for distinguishing between allocable and apportionable income.

FN10. Nebraska enacted its corporate income tax in 1967.

FN11. New Hampshire does not consider the unitary corporate business in determining the income tax base. However, possible implementation of such a policy, under certain circumstances, is now under review.

FN12. New Hampshire's corporate income tax became effective in 1970.

FN13. Ohio adopted income as an alternative base for its corporate franchise tax in 1971.

FN14. Tennessee prefers a strict interpretation of UDITPA, and does not go along with the trend of defining as much income as possible as "business" income and thus including it in the apportionment base.

FN15. West Virginia did not enact its Corporate Net Income Tax until 1967.

FN16. Wisconsin employs the "business/non-business" distinction to a limited extent by allocating rental and royalty from tangible property not directly used in the production of business income. All income from farms, mines, and quarries are allocated to the situs of the property; all other income is apportionable.

FN17. Inter-company transactions may be adjusted under provisions of Wisconsin law similar Section 482 of the Internal Revenue Code.

*96 10(A). Do you ever perform an audit for another state or permit another state or outside *97 party to perform an audit for you; or do you ever cooperate with another state in assigning an audit to an outside party or organization?

YES: 15 NO: 30 N/A: 6

(B). If so, what basis, with whom, and to whom?

Assign to the Multistate Tax Commismission: 15 (A few of the states who assign audits to the MTC *also* participate in cooperative audits to a limited extent.)

Other: 0 N/A: 36

(C). Did you do so ten years ago?

YES: 0 NO: 38 N/A: 13

other states or corporations?

11(A). Do you ever share income tax information with

YES: 38 NO: 7 N/A: 6

*98 TABLE III

State	10A	10B	10C	11A
Alabama.	NO	N/A	NO	YES
Alaska.	YES	MTC	NO	YES
Arizona.	NO	N/A	NO	YES
Arkansas.	YES	MTC	NO	YES
California.	YES	MTC	NO	YES
Colorado.	YES	MTC[FN1]	NO	YES
Connecticut.	NO	N/A	NO	NO
Delaware.	NO	N/A	NO	YES
District of Columbia.	NO	N/A	NO	YES
Florida.	NO	N/A	N/A[FN2]	YES
Georgia.	NO	N/A	NO	NO
Hawaii.	YES	MTC	NO	YES
Idaho.	YES	MTC[FN3]	NO	YES
Illinois.	NO	N/A	N/A[FN4]	YES
Indiana.	YES	MTC	NO	YES
Iowa.	NO	N/A	NO	NO
Kansas.	YES	MTC[FN5]	NO	YES
Kentucky.	NO	N/A	NO	YES
Louisiana.	NO[FN6]	N/A	NO	YES
Maine.	NO	N/A	N/A[FN7]	NO
Maryland.	NO	N/A	NO	YES
Massachusetts.	NO	N/A	NO	YES
Michigan.	N/A	N/A	N/A	N/A
Minnesota.	NO	N/A	NO	YES
Mississippi.	NO	N/A	NO	YES

Missouri.	YES	MTC	NO	YES
Montana.	YES	MTC[FN8]	NO	YES
Nebraska.	YES	MTC[FN9]	N/A[FN10]	YES
Nevada.	N/A	N/A	N/A	N/A
New Hampshire.	NO	N/A	N/A[FN11]	NO
New Jersey.	NO	N/A	NO	NO
New Mexico.	YES	MTC	NO	YES
New York.	NO	N/A	NO	YES
North Carolina.	NO	N/A	NO	YES
North Dakota.	YES	MTC[FN12]	NO	YES
Ohio.	NO	N/A	N/A[FN13]	YES
Oklahoma.	NO	N/A	NO	YES
Oregon.	YES	MTC	NO	YES
Pennsylvania.	NO	N/A	NO	YES
Rhode Island.	NO	N/A	NO	YES
South Carolina.	NO	N/A	NO	YES
South Dakota.	N/A	N/A	N/A	N/A
Tennessee.	NO	N/A	NO	YES
Texas.	N/A	N/A	N/A	N/A
Utah.	YES	MTC	NO	YES
Vermont.	NO	N/A	NO	YES
Virginia.	NO	N/A	NO	YES
Washington.	N/A	N/A	N/A	N/A
West Virginia.	NO	N/A	N/A[FN14]	NO[FN15]
Wisconsin.	NO	N/A	NO	YES
Wyoming.	N/A	N/A	N/A	N/A

FN1. Colorado law allows it to enter into an agreement with other states for joint audits.

FN2. Florida had no corporate income tax ten years ago.

FN3. Idaho also joins with other states to perform cooperative audits.

FN4. Illinois had no corporate income tax ten years ago.

FN5. Kansas also joins with other states to perform cooperative audits.

FN6. Louisiana can join with other states to perform cooperative audits.

FN7. Maine had no corporate income tax ten years ago.

FN8. Montana also joins with other states to perform cooperative audits.

FN9. Nebraska also joins with other states to perform cooperative audits.

FN10. Nebraska had no corporate income tax ten years ago.

FN11. New Hampshire had no corporate income tax ten years ago.

FN12. North Dakota also joins with other states to perform cooperative audits.

FN13. Ohio had no corporate income tax ten years ago.

FN14. West Virginia had no net corporate income tax ten years ago.

FN15. West Virginia shares gross income tax information with West Virginia municipalities only.

*100 12(A). Does your state use federal taxable income in determining the income base?

YES:	36	NO:	9	N/A:	6

(B). If so, what line of Form 1120?

Line 28:	15	Line 30:	20	N/A:	15

(C). Did it do so 10 years ago?

YES:	20	NO:	18	N/A:	13

13(A). Does your state allow the federal asset depreciation range?

YES:	42	NO:	3	N/A:	6

(B). If so, when did it start doing so? (FF indicates that the state followed the federal practice in effect at the time.)

*101 Thirteen states have begun allowing the federal ADR since 1966, including the seven states that have adopted corporate income taxes since then. (In addition, Vermont began allowing the ADR in 1966.)

14. What jurisdictional standards does your state apply which are different from those imposed by the U.S. Constitution and Public Law 86-272 (73 Stat. 555, 15 U.S.C. 381-384) with respect to out-of-state sellers selling into your state?

Few states apply any jurisdictional standards in addition to P.L. 86-272. Some apply standards only very slightly more restrictive than those imposed by the constitution and the federal government. But the response to this survey indicates that no state is attempting to apply standards apparently prohibited by P.L. 272. Several states, however, admit to using a narrow and very strict interpretation of that law as their standard.

The District of Columbia claims exemption from the provisions of P.L. 272 on the grounds that the District is not a state. Under the provisions of their law, they tax all corporations engaged in a trade or business within D.C. or receiving income from sources within D.C. On the sale of tangible personal property, the corporation must have an office, warehouse, or other place of business in the District to be subject to the D.C. Franchise Tax.

15(A). Regarding the sales factor, are all sales attributed to the state of destination, without regard to the seller's business situs in that state?

YES: 15 NO: 29 N/A: 7

Origin (only): 3
Destination (only): 15
N/A: 7

*102 (B). If not, on what basis are sales attributed otherwise?

Throwback (rule): 25
Throwout (rule): 1

*103 TABLE IV

State	12A	12B	12C	13A	13B	15B
Alabama.	NO	N/A	NO	YES	FF	Throwback
Alaska.	YES	28	YES	YES	FF	Throwback
Arizona.	YES	30	YES	YES	1954	Throwback
Arkansas.	NO	N/A	NO	YES	FF	Throwback
California.	YES	28	YES	NO[FN1]	N/A	Throwback
Colorado.	YES	30	YES	YES	1960	Throwback[FN2]
Connecticut.	YES	28	YES	YES	FF	Destination
Delaware.	YES	30	YES	YES	1958	Destination
District of Columbia.	NO	N/A	NO	YES	FF	Throwback
Florida.	YES	30	N/A[FN3]	YES	1972	Destination
Georgia.	YES	30	NO	YES	1969	Destination
Hawaii.	YES	30	YES	YES	FF	Throwback
Idaho.	YES	28	YES	YES	FF	Throwback
Illinois.	YES	30	N/A[FN4]	YES	FF	Throwback
Indiana.	YES	30	YES	YES	FF	Throwback
Iowa.	YES	30	YES	YES	FF	Destination
Kansas.	YES	30	YES	YES	FF	Throwback
Kentucky.	YES	--[FN5]	YES	YES	1972	Destination

Louisiana.	NO	N/A	NO	YES	c. 1948	Destination
Maine.	YES	30	N/A[FN6]	YES	FF	Throwback
Maryland.	YES	30	NO	YES	1968	Origin
Massachusetts.	YES	28	YES	YES	FF	Throwback
Michigan.	N/A	N/A	N/A	N/A	N/A	N/A
Minnesota.	NO	N/A	NO	YES	1971	Destination
Mississippi.	NO	N/A	NO	YES	1971	Origin
Missouri.	YES	30	NO	YES	1973	Throwback
Montana.	YES	28	YES	YES	FF	Throwback
Nebraska.	YES	30	N/A[FN7]	YES	FF	Throwback
Nevada.	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire.	YES	28	N/A	YES	1970	Throwback
New Jersey.	YES	28	YES	YES	FF	Destination
New Mexico.	YES	30	YES	YES	FF	Throwback
New York.	YES	28	YES	YES	FF	Destination
North Carolina.	YES	28	NO[FN8]	YES	FF	Destination
North Dakota.	YES	30	YES	YES	FF	Throwback
Ohio.	YES	28	N/A[FN9]	YES	1971	Destination
Oklahoma.	YES	30	NO	YES	1971	Throwback
Oregon.	YES[FN10]	28	NO	NO	N/A	Throwback
Pennsylvania.	YES	28	YES	YES	1935	Throwout
Rhode Island.	YES	28	NO	YES	FF	Destination
South Carolina.	NO	N/A	NO	NO	N/A	Throwback
South Dakota.	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee.	YES	28	NO	YES	FF	Destination
Texas.	N/A	N/A	N/A	N/A	N/A	N/A
Utah.	NO	N/A	NO	YES	FF	Destination
Vermont.	YES	30	YES	YES	1966	Origin

Virginia.	YES	30	NO	YES	1972	Throwback
Washington.	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia.	YES	30	N/A[FN11]	YES	FF	N/A[FN12]
Wisconsin.	NO[FN13]	N/A	NO	YES	1964	Throwback
Wyoming.	N/A	N/A	N/A	N/A	N/A	N/A

FN1. California uses the mid-point of the federal asset depreciation range as a guideline but does not allow the entire federal range for depreciation purposes.

FN2. Colorado also permits corporations to use a two factor formula, sales and property. For this formula, all sales are attributed to state of destination. Colorado's three factor formula (UDITPA) requires that sales to the U.S. government be attributed to state of origin.

FN3. Florida had no corporate income tax ten years ago.

FN4. Illinois had no corporate income tax ten years ago.

FN5. Kentucky uses federal taxable income "by definition"; i.e., it does not use any particular line of Form 1120, but it does follow federal definitions to arrive at taxable income. Kentucky's form then provides for a reconciliation with the federal return.

FN6. Maine had no corporate income tax ten years ago.

FN7. Nebraska had no corporate income tax ten years ago.

FN8. North Carolina began using federal taxable income in determining the income base effective January 1, 1967.

FN9. Ohio had no corporate income tax ten years ago.

FN10. Oregon uses federal taxable income in determining the income base, not by statute, but by administrative practice.

FN11. West Virginia had no corporate income tax ten years ago.

FN12. West Virginia's formula has no sales factor.

FN13. Wisconsin only uses federal taxable income in determining the Wisconsin taxable income of domestic insurance companies, real estate investment trusts, and regulated investment companies.

*105 16(A). Does your state (ever) allow credit against use tax liability on (purchases) other than vehicles for sales tax due and paid in other states, with respect to the same purchase transaction and the same property?

YES: 42 NO: 4 N/A: 5

16(C). Did it do so 10 years ago?

YES: 32 NO: 11 N/A: 8

17. Does your state recognize and comply with the Uniform Sales and Use Tax Jurisdictional Standard of the Multistate Tax Commission?

YES: 23 NO: 23 N/A: 5

*106 18. Does your state accept the Uniform Sales and Use Tax Exemption Certificate sponsored by the Multistate Tax Commission?

YES: 35 NO: 12 N/A: 4

19. Does your state furnish information (to other states) regarding out-of-state purchasers claiming exemption (from sales tax in those states)?

YES: 28 NO: 18 N/A: 5

*107 TABLE V

State	16A	16C	17	18	19
Alabama.	YES	YES	NO	YES	NO
Alaska.	N/A	N/A	N/A	YES[FN1]	N/A
Arizona.	YES	YES	YES	YES	YES
Arkansas.	YES	YES	YES	YES	YES
California.	YES	NO[FN2]	NO	NO[FN3]	YES[FN4]
Colorado.	YES	YES	YES	YES	YES
Connecticut.	YES	YES	NO	YES	YES
Delaware.	N/A	N/A	N/A	N/A	N/A
District of Columbia.	YES	YES	NO	YES	NO
Florida.	YES	YES	NO	NO	NO
Georgia.	YES	YES	NO	YES	NO
Hawaii.	YES	NO	NO	NO	NO
Idaho.	YES	NO	YES	YES	YES

Illinois.	YES	YES	YES	YES	YES
Indiana.	YES	YES	YES	NO	YES
Iowa.	YES	YES	YES	YES	YES
Kansas.	YES	YES	YES	YES	YES
Kentucky.	YES	YES	YES	NO	YES
Louisiana.	YES	YES	NO	NO	YES
Maine.	YES	YES	NO	YES	YES
Maryland.	YES	YES	NO	YES	YES
Massachusetts.	YES	YES	YES	YES	YES
Michigan.	YES	YES	YES	YES	NO
Minnesota.	YES	N/A[FN5]	YES	YES	YES
Mississippi.	YES	YES	NO	NO	YES
Missouri.	YES	YES	YES	YES	YES
Montana.	N/A	N/A	N/A	N/A	N/A
Nebraska.	YES	N/A	YES	YES	NO
Nevada.	YES[FN6]	NO[FN6]	YES	YES	NO
New Hampshire.	N/A	N/A	N/A	N/A	N/A
New Jersey.	YES	YES	NO	NO	NO
New Mexico.	NO	NO	YES	YES[FN7]	NO
New York.	YES	YES	NO	NO	NO
North Carolina.	YES	NO	NO	NO	NO
North Dakota.	YES	YES	YES	YES	YES
Ohio.	NO	N/A	NO	NO	NO
Oklahoma.	YES	YES	NO	YES	NO
Oregon.	N/A	N/A	N/A	N/A	N/A
Pennsylvania.	YES	YES	NO	YES	YES
Rhode Island.	YES	YES	NO	YES	NO
South Carolina.	NO	NO	NO	YES	YES
South Dakota.	YES	NO	YES	YES	YES
Tennessee.	YES	YES	YES	YES	YES
Texas.	YES	YES	YES	YES	YES
Utah.	YES	NO[FN8]	YES	YES	YES
Vermont.	YES	YES	NO	YES	YES

Virginia.	YES	YES	NO	YES	YES
Washington.	YES	NO[FN9]	YES	YES	YES[FN10]
West Virginia.	NO	NO	NO	NO	YES
Wisconsin.	YES	YES	NO	YES	NO
Wyoming.	YES	YES	YES	YES	NO

FN1. Alaska accepts the Uniform Exemption Certificate for Gross Receipts Tax Purposes. Alaska does not impose a sales or use tax at the state level.

FN2. California did not allow credit against use tax liability prior to July 1, 1967 for purchases other than passenger vehicles.

FN3. California has made certain modifications to the certificate, and if adopted would accept the modified certificate.

FN4. California furnishes information only with the Governor's authorization. At present, such authorization exists for several states.

FN5. Minnesota did not enact its sales tax until 1967.

FN6. Nevada allows credit against use tax liability only on purchases made in full voting member states of the Multistate Tax Commission, on all tangible personal property. Nevada enacted the Multistate Tax Compact in 1967.

FN7. New Mexico taxpayers are required to use special New Mexico certificates.

FN8. Utah enacted its credit against use tax liability provision in 1967.

FN9. Washington had no credit against use tax liability prior to enacting the Multistate Tax Compact in 1967.

FN10. Washington has no procedure for automatically furnishing information regarding out-of-state purchasers claiming exemption. Vendors are not required to file reports identifying purchasers, thus, information is not readily available and could only be developed through audit.

UNITED STATES STEEL CORPORATION, et al., on behalf of themselves and all persons similarly situated, Appellants, v. MULTISTATE TAX COMMISSION, et al., Appellees.
1977 WL 189138 (U.S.) (Appellate Brief)

END OF DOCUMENT

(3)

COLORADO REVISED STATUTES

*** This document reflects changes current through all laws passed at the First Regular Session of the Sixty-Ninth General Assembly of the State of Colorado (2013) ***

TITLE 24. GOVERNMENT - STATE
INTERSTATE COMPACTS AND AGREEMENTS
ARTICLE 60. INTERSTATE COMPACTS AND AGREEMENTS
PART 13. MULTISTATE TAX COMPACT

GO TO COLORADO STATUTES ARCHIVE DIRECTORY

C.R.S. 24-60-1301 (2013)

24-60-1301. Execution of compact

The governor is hereby authorized to enter into a compact on behalf of this state with any of the United States or other jurisdictions legally joining therein in the form substantially as follows:

Article I.

Purposes.

The purposes of this compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

Article II.

Definitions.

As used in this compact:

1. "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any Territory or Possession of the United States.

2. "Subdivision" means any governmental unit or special district of a State.

3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one State.

4. "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions.

5. "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by State or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to determinations pursuant to Article IV.

Article III.

Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

1. Repealed.

Taxpayer Option, Short Form.

2. Each party State or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the State or subdivision, as the case may be, is not in excess of $100,000 may elect to report and pay any tax due on the basis of a percentage of such volume, and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax Commission, not more than once in five years, may adjust the $100,000 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the Commission, shall replace the $100,000 figure specifically provided herein. Each party State and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

Article IV.

Division of Income.

1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or

business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a Federal, State or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any Territory or Possession of the United States, and any foreign country or political subdivision thereof.

(i) "This State" means the State in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this State, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another State if (1) in that State he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that State has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the State does or does not.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this State are allocable to this State.

(b) Net rents and royalties from tangible personal property are allocable to this State: (1) if and to the extent that the property is utilized in this State, or (2) in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the State in which the property is utilized.

(c) The extent of utilization of tangible personal property in a State is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is

the property was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this State are allocable to this State.

(b) Capital gains and losses from sales of tangible personal property are allocable to this State if (1) the property had a situs in this State at the time of the sale, or (2) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the State in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this State if the taxpayer's commercial domicile is in this State.

7. Interest and dividends are allocable to this State if the taxpayer's commercial domicile is in this State.

8. (a) Patent and copyright royalties are allocable to this State: (1) if and to the extent that the patent or copyright is utilized by the payer in this State, or (2) if and to the extent that the patent copyright is utilized by the payer in a State in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(b) A patent is utilized in a State to the extent that it is employed in production, fabrication, manufacturing, or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the patent is utilized in the State in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a State to the extent that printing or other publication originates in the State. If the basis of receipts from copyright royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the copyright is utilized in the State in which the taxpayer's commercial domicile is located.

9. All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

10. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this State during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this State if:

(a) the individual's service is performed entirely within the State;

(b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

(c) some of the service is performed in the State and (1) the

of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

16. Sales of tangible personal property are in this State if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this State regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the State of the purchaser.

17. Sales, other than sales of tangible personal property, are in this State if:

(a) the income-producing activity is performed in this State; or

(b) the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other State, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V.

Elements of Sales and Use Tax Laws.

Tax Credit.

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption Certificates, Vendors May Rely.

2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate State or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI.

The Commission.

Organization and Management.

1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies. If there is more than one such agency the State shall provide by law for the selection of the Commission member from the heads of the relevant agencies. State law may provide that a member of the Commission be represented by an alternate but only if there is on file with the Commission written notification of the designation and identity of the alternate. The Attorney General of each party State or his designee, or other counsel if the laws of the party State specifically provide, shall be entitled to attend the meetings of the Commission, but shall not vote. Such Attorneys General, designees, or other counsel shall receive all notices of meetings required under paragraph 1 (e) of this Article.

(b) Each party State shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the Commission member from that State.

(c) Each member shall be entitled to one vote. The Commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The Commission shall adopt an official seal to be used as it may provide.

(e) The Commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its Executive Committee may determine. The Commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The Commission shall elect annually, from among its members, a Chairman, a Vice Chairman and a Treasurer. The Commission shall appoint an Executive Director who shall serve at its pleasure, and it shall fix his duties and compensation. The Executive Director shall be Secretary of the Commission. The Commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party State, the Executive Director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the Commission and shall fix their duties and compensation. The Commission bylaws shall provide for personnel policies and programs.

(h) The Commission may borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity.

(i) The Commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The Commission may establish one or more offices for the transacting of its business.

(k) The Commission shall adopt bylaws for the conduct of its business. The Commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party States.

(l) The Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year. Any donation or grant accepted by the Commission or services borrowed shall be reported in the annual report of the Commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The Commission may make additional reports as it may deem desirable.

Committees.

2. (a) To assist in the conduct of its business when the full Commission is not meeting, the Commission shall have an Executive Committee of seven members, including the Chairman, Vice Chairman, Treasurer and four other members elected annually by the Commission. The Executive Committee, subject to the provisions of this compact and consistent with the policies of the Commission, shall function as provided in the bylaws of the Commission.

(b) The Commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the Commission, including problems of special interest to any party State and problems dealing with particular types of taxes.

(c) The Commission may establish such additional committees as its bylaws may provide.

Powers.

3. In addition to powers conferred elsewhere in this compact, the Commission shall have power to:

(a) Study State and local tax systems and particular types of State and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

4. (a) The Commission shall submit to the Governor or designated officer or officers of each party State a budget of its estimated expenditures for such period as may be required by the laws of that State for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party States. The total amount of appropriations requested under any such budget shall be apportioned among the party States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party State and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the Commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party States. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The Commission shall not pledge the credit of any party State. The Commission may meet any of its obligations in whole or in part with funds available to it under paragraph 1 (i) of this Article: provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under paragraph 1 (i), the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party States and by any persons authorized by the Commission.

(f) Nothing contained in this Article shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VII.

Uniform Regulations and Forms.

1. Whenever any two or more party States, or subdivisions of party States, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the Commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The Commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the Commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party States and subdivisions thereof and to all taxpayers and other persons who have made timely request of the Commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party States and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the Commission.

3. The Commission shall submit any regulations adopted by it to the appropriate officials of all party States and subdivisions to which they might apply. Each such State and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII.

Interstate Audits.

1. This Article shall be in force only in those party States that specifically provide therefor by statute.

2. Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident: provided that such State has adopted this Article.

4. The Commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated. The provisions of this paragraph shall

State that has adopted this Article.

5. The Commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the Commission.

6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit, and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party States or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the Commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax", in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX.

Arbitration.

1. Whenever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The Commission shall select and maintain an Arbitration Panel composed of officers and employees of State and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party State or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the Commission and to each party State or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the State or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party States or subdivisions thereof. Each party State and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The Arbitration Board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the Commission's Arbitration Panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the Arbitration Panel. The two persons selected for the Board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the Board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the Arbitration Panel. No member of a Board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The Board may sit in any State or subdivision party to the proceeding, in the State of the taxpayer's incorporation, residence or domicile, in any State where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The Board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The Board shall act by majority vote.

7. The Board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the Board. In case of failure to obey a subpoena, and upon application by the Board, any judge of a court of competent jurisdiction of the State in which the Board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in States that have adopted this Article.

8. Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the Board in such manner as it may determine. The Commission shall fix a schedule of compensation for members of Arbitration Boards and of other allowable expenses and costs. No officer or employee of a State or local government who serves as a member of a Board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such Board member shall be entitled to expenses.

9. The Board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the Board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The Board shall file with the Commission and with each tax agency represented in the proceeding: the determination of the Board; the Board's written statement of its reasons therefor; the record of the Board's proceedings; and any other documents required by the arbitration rules of the Commission to be filed.

11. The Commission shall publish the determinations of Boards together with the statements of the reasons therefor.

12. The Commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party States.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

Article X.

Entry Into Force and Withdrawal.

1. This compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof. The Commission shall arrange for notification of all party States whenever there is a new enactment of the compact.

2. Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.

3. No proceeding commenced before an Arbitration Board prior to the withdrawal of a State and to which the withdrawing State or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the Board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI.

Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: provided that the definition of "tax" in Article VIII 9 may apply for the purposes of that Article and the Commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII.

Construction and Severability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters.

HISTORY: Source: L. 68: p. 175, § 1. C.R.S. 1963: § 74-14-1.L. 2008: Art. III, par. 1 repealed, p. 953, § 2, effective January 1, 2009.

NOTES:

LexisNexis Practice Insights

1. Colorado's Three-Factor Apportionment Method: Understanding the Payroll Factor

2. Implementing FIN 48: Evaluating Business and Non-Business Income Tax Positions and the Operational Connection Test

3. Colorado's Three-Factor Apportionment Method: Understanding the Sales Factor

4. Understanding Colorado's Sales-Sourcing Rule Under the State's Three Factor Formulary Apportionment Method

5. Colorado's Three-Factor Apportionment: Understanding the Allocation of Interest and Dividends

6. Colorado's Three-Factor Apportionment: Understanding the Allocation of Gains and Losses from Property

7. Understanding Colorado's Formulary Apportionment: The Three-Factor Method

8. Colorado's Three-Factor Apportionment Method: Understanding the Property Factor

9. Understanding Colorado's Sales-Sourcing Rule under the State's Single Sales Factor Formulary Apportionment Method; the Throwback Rule No Longer Applies

10. Corporations Doing Business in More than One State Must Elect an Apportionment Method; The

11. Understanding the History and Structure of Colorado's Corporate Income-Tax Scheme

Cross references: For elections, see title 1; for peace officers and firefighters, see article 5 of title 29; for state engineer, see article 80 of title 37; for state chemist, see part 4 of article 1 of title 25; for offenses against government, see article 8 of title 18; for the "Uniform Records Retention Act", see article 17 of title 6.

ANNOTATION

Law reviews. For article, "Colorado Sales and Use Tax Consequences in Sales of Businesses", see 11 Colo. Law. 679 (1982). For article, "Colorado Sales and Use Taxes In the Multistate Context", see 20 Colo. Law. 501 (1991). For article, "Colorado's Income Tax as Applied to Foreign Holding Companies", see 23 Colo. Law. 1107 (1994). For article, "Home Rule Use-Tax Credits and Interstate Multi-Jurisdictional Transactions", see 30 Colo. Law. 79 (May 2001).

"Clear and cogent" evidence that extraterritorial values are being taxed is necessary to challenge apportionment scheme. To succeed in challenging the constitutionality of the apportionment scheme used in this section to determine Colorado's fair taxable share of a company's business income, one must show by "clear and cogent" evidence that it results in extraterritorial values being taxed. Atlantic Richfield Co. v. State, 198 Colo. 413, 601 P.2d 628 (1979).

Test of an "integrated business" is whether or not the operation of a portion of the business within the state is dependent upon or contributory to the operation of the business outside the state. Kraftco Corp. v. Charnes, 636 P.2d 1300 (Colo. App. 1981).

Presumption that all income is business income. The compact presumes all income which arises from the conduct of a trade or business to be business income unless clearly shown to be otherwise. Lone Star Steel Co. v. Dolan, 642 P.2d 29 (Colo. App. 1981), aff'd in part and rev'd in part on other grounds, 688 P.2d 916 (Colo. 1983).

Taxpayer has burden to prove income is not business income. The taxpayer has the burden of proof to show, by clear and convincing evidence, that income arising from the conduct of a trade or business is not business income. Lone Star Steel Co. v. Dolan, 642 P.2d 29 (Colo. App. 1981), aff'd in part and rev'd in part on other grounds, 688 P.2d 916 (Colo. 1983).

Interest income from short-term securities representing investment of idle funds until needed to meet the taxpayer's ordinary business obligations is considered business income. Lone Star Steel Co. v. Dolan, 642 P.2d 29 (Colo. App. 1981), aff'd in part and rev'd in part on other grounds, 688 P.2d 916 (Colo. 1983).

Goods delivered to intermediary for shipment not "sale". When goods are delivered to an intermediary for wrapping and then shipped by common carrier to an out-of-state purchaser, there is no Colorado sale for income tax purposes. Lone Star Steel Co. v. Dolan, 668 P.2d 916 (Colo. 1983).

For test as to existence of "unitary business", see Lone Star Steel Co. v. Dolan, 668 P.2d 916 (Colo. 1983).

Applied in Miller Int'l, Inc. v. Dept. of Rev., 646 P.2d 341 (Colo. 1982).

C.R.S. 24-60-1302

COLORADO REVISED STATUTES

*** This document reflects changes current through all laws passed at the First Regular Session of the Sixty-Ninth General Assembly of the State of Colorado (2013) ***

TITLE 24. GOVERNMENT - STATE
INTERSTATE COMPACTS AND AGREEMENTS
ARTICLE 60.INTERSTATE COMPACTS AND AGREEMENTS
PART 13. MULTISTATE TAX COMPACT

GO TO COLORADO STATUTES ARCHIVE DIRECTORY

C.R.S. 24-60-1302 (2013)

24-60-1302. Article XX of state constitution not modified

No provision of the multistate tax compact shall modify article XX of the constitution of the state of Colorado.

HISTORY: Source: L. 68: p. 187, § 1. C.R.S. 1963: § 74-14-2.

COLORADO REVISED STATUTES

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TITLE 24. GOVERNMENT - STATE
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PART 13. MULTISTATE TAX COMPACT

GO TO COLORADO STATUTES ARCHIVE DIRECTORY

C.R.S. 24-60-1307 (2013)

24-60-1307. Effective dates

(1) All provisions of this part 13, including membership in the multistate tax commission, shall be effective upon execution of the compact by the governor; except that:

(a) Provisions of articles III, IV, V, VIII, and IX of the compact shall apply to all taxable years beginning on and after July 1, 1968; and

(b) In no case shall the provisions of this part 13 apply to taxable years commencing on or before June 30, 1968.

HISTORY: Source: L. 68: p. 188, § 2. C.R.S. 1963: § 74-14-6.

C.R.S. 24-60-1308

COLORADO REVISED STATUTES

*** This document reflects changes current through all laws passed at the First Regular Session of the Sixty-Ninth General Assembly of the State of Colorado (2013) ***

TITLE 24. GOVERNMENT - STATE
INTERSTATE COMPACTS AND AGREEMENTS
ARTICLE 60.INTERSTATE COMPACTS AND AGREEMENTS
PART 13. MULTISTATE TAX COMPACT

GO TO COLORADO STATUTES ARCHIVE DIRECTORY

C.R.S. 24-60-1308 (2013)

24-60-1308. Applicability of article IV of compact

For income tax years commencing on or after January 1, 2009, a taxpayer may not use the provisions of article IV of the multistate tax compact to apportion and allocate income to Colorado.

HISTORY: Source: L. 2008: Entire section added, p. 954, § 3, effective January 1, 2009.

(4)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

THE GILLETTE COMPANY & SUBSIDIARIES, Plaintiffs & Appellants, v. CALIFORNIA FRANCHISE TAX BOARD, AN AGENCY OF THE STATE OF CALIFORNIA, Defendant and Respondent.	Case No. A130803

San Francisco County Superior Court, Case No. CGC-10-495911
[Consolidated Case Nos. CGC-10-495912; CGC-10-495916; CGC 10-496437; CGC-10-496438; CGC-10-499083]
Honorable Richard A. Kramer, Judge

BRIEF OF THE MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT AND RESPONDENT

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INTEREST OF THE AMICUS

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of the California Franchise Tax Board.[1] California's adoption of a mandatory double-weighted sales factor[2] is wholly consistent with the terms of the Multistate Tax Compact,[3] which accords its members flexibility to vary – directly or indirectly – from Compact Articles III.1 and IV. It is the compact members themselves who determine any limitations on that flexibility, consistent with the purposes of the Compact. And the members have indicated by their course of performance that the California legislation is compatible with those purposes.

The Commission is the administrative agency for the Compact, which became effective in 1967 when the required minimum of seven states had enacted it. The United States Supreme Court upheld the validity of the Compact in *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), and today forty-seven states and the District of Columbia participate in the Commission's activities. Twenty of those jurisdictions

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the state of California.

[2] Calif. Rev. & Tax. Code § 25128(a).

[3] Multistate Tax Compact, RIA State & Local Taxes: All States Tax Guide (2005); The Model Multistate Tax Compact can be found at: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf.

adopted the Compact by statutory enactment. Six are sovereignty members. Another twenty-two are associate members.[4]

The stated purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation.[5]

These purposes are central to the very existence of the Compact, which was the states' answer to an urgent need for reform in state taxation of interstate commerce.[6] If the states failed to act, Congress stood ready to impose reform through federal legislation that would preempt and regulate important aspects of state taxation. Preserving state tax

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[4] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, New Jersey, South Carolina, and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Wisconsin, and Wyoming.

[5] Multistate Tax Compact, Art. I.

[6] *See, H.R. Rep.* No. 89-952, Pt. VI, p. 1143 (1965) and *Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966), illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax.

sovereignty under our vibrant federalism remains a key purpose of the Compact and the Commission.

The Commission's interest in this case arises directly from the Compact's purposes of promoting uniformity and preserving member states' sovereign authority to effectuate their own tax policies. Our interest is particularly acute because the achievement of those purposes is being challenged, perversely, on the basis of the Compact itself. As the administrative agency for the Compact, the Commission is uniquely situated to inform the Court regarding a proper interpretation of this Compact and the course of performance of its members. *We interpret the terms of the Compact to allow for the flexibility which the state of California has exercised.* That interpretation is supported by the course of performance of the other Compact members, consistent with the purposes of the Compact, the holdings of the United States Supreme Court, and compact jurisprudence from other federal and state courts. To hold otherwise would have the contrary effect of frustrating the very purposes that the Compact is intended to promote.

INTRODUCTION

In 1993, when the California Legislature determined that the state's corporate taxpayers must apportion their income using a double-weighted sales factor, California joined a nation-wide transition away from an equal-weighting of the property, payroll, and sales factors and toward an emphasis on the sales factor in state apportionment formulas. Today, thirty-nine of forty-seven states with a corporate income tax at least

double-weight the sales factor.[7] The question we address is whether the Multistate Tax Compact adopted by California affords the flexibility to participate in this nation-wide trend, and to accomplish its legislature's objectives, consistent with the Compact's purposes of preserving state sovereignty and promoting uniformity. The answer is that it does.

In the early days of corporate income taxes, a myriad of different apportionment methodologies were in use by the states. The Uniform Law Commission had promulgated the model Uniform Division of Income for Tax Purposes Act (UDITPA), which includes the equal-weighted formula, in 1957, but states were not rushing to adopt it.[8] Then, in 1959, the United States Supreme Court decided *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), holding that a small sales force office in a state is a sufficient presence to establish nexus in that state.[9] The decision created turmoil among multistate taxpayers. Within seven weeks, Congress was holding hearings, and in just over six months it had passed P.L.86-272, which restricted the application of *Northwest States Portland Cement Co.* and created a Special

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[7] *State Apportionment of Corporate Income;* Federation of Tax Administrators http://www.taxadmin.org/Fta/rate/apport.pdf .

[8] Uniform Division of Income for Tax Purposes Act, 7A part 1 West's Uniform Laws Annotated (2002) page 141.

[9] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, commonly called the Willis Committee, to study state business taxes.[10]

The Willis Committee performed an extensive study and found that although "each of the state laws contains its own inner logic, the aggregate of these laws – comprising the system confronting the interstate taxpayer – defies reason."[11] The Committee found the benefits of increased uniformity so compelling that it recommended federal legislation to, among other things, establish a uniform state income tax base (federal AGI) and a uniform state apportionment formula (equal-weighted two-factor formula based on property and payroll) – both of which are fundamental aspects of a state tax policy, the federal pre-emption of which would comprise a significant affront to state tax sovereignty.[12]

The states rallied to stave off federal intervention and protect their sovereignty. Many adopted UDITPA directly into their statutes. Some enacted the Multistate Tax Compact, Article IV of which incorporates UDITPA nearly word for word. And some,

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[10] PUB. LAW 86-272, TITLE II, 73 STAT. 555 (1959). *See,* Fatale, Michael T.; *Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86-272*; Virginia Tax Review, Volume 21, No. 4, pp. 475-476 (spring 2002).

[11] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965). The Willis Committee's study was sanctioned by Title II of Pub. L. 86-272, 73 Stat. 555, 556 (1959), to consider additional issues surrounding adoption of that Act.

[12] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1139*ff* (1965).

like California, did both. The California legislature enacted UDITPA in 1966 and the Multistate Tax Compact in 1974.[13]

By 1978, the U.S. Supreme Court recognized that the equal-weighted formula was "the prevalent practice,"[14] and a "rough, practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates."[15] But at the same time the Court recognized that "political and economic considerations vary from state to state," and that states may constitutionally address those considerations by requiring alternative factor weightings.[16] Over time, the states have done so. And while they have moved away from requiring the equal-weighted formula, they have moved in a decidedly uniform manner: by emphasizing the sales factor.

Today, 39 of the 47 states with a corporate income tax at least double weight the sales factor.[17] Only eight states exclusively require the equal-weighted formula.[18] Among compact members, the movement is the same. Only seven of the twenty compact

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[13] Cal. Stats 1966 ch 2 §7. Calif. Rev. & Tax. Code §§ 25120-25139. Calif. Rev. & Tax. Code § 38006. *et seq.*

[14] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

[15] *General Motors Corp. v. District of Columbia,* 380 U.S. 553, 561 (1983).

[16] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

[17] *State Apportionment of Corporate Income;* Federation of Tax Administrators http://www.taxadmin.org/Fta/rate/apport.pdf

[18] *Id.*

members continue to require an equal-weighted formula.[19] Ten require at least a double-weighted sales factor.[20]

Furthermore, virtually all compact members have managed this movement away from equal-weighting in a manner that does not permit an Article III.1 election. Only one compact member currently recognizes the election.[21] Three compact members have eliminated or limited the election directly.[22] Three have amended Article IV to be consistent with their statutory apportionment formula that emphasizes the sales factor.[23] Four, including California, have indicated by separate statute or law that the compact election does not apply to factor-weighting.[24] And the remaining members require an

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[19] *Id.* Alaska, District of Columbia, Hawaii, Kansas (a single sales factor election is available only for "qualified taxpayers," K.S.A. 79-3279(b)(2)), Montana, New Mexico, and North Dakota.

[20] *Id.* Alabama (House Bill amended Code of Ala. § 434 40-27-1 for tax years beginning after December 31, 2010), Arkansas, California, Colorado, Idaho, Michigan, Minnesota, Oregon, Texas, and Utah. One compact member, Missouri, allows an election between equal-weighting and separate accounting. The remaining two members, Washington and South Dakota, joined the Compact despite the fact they have not imposed a corporate income tax. The Franchise Tax Board notes in its brief that members have also diverged from the Compact in other ways. Respondent's Brief at 19-24.

[21] Missouri Rev. Statutes § 32.200.

[22] Colorado (C.R.S. §§ 39-22-303.5 and 39-22-303.7); Minnesota (Minn. Statutes § 290.171); Michigan (as applied to the Michigan Business Tax after January 1, 2011; MCL 205.581; *See,* H.B. 4479 (2011)).

[23] Alabama (Code of Ala. § 434 40-27-1), Arkansas(Ark. Code § 26-5-101), Utah (Utah Code § 59-1-801.IV.9)

[24] California (Calif. Rev. and Tax. Code § 25128(a)), Idaho (Idaho Stat. § 63-3027(i)), Oregon (O.R.S. §§ 314.606), Texas (letter ruling 201007003L).

equal-weighted factor, identical to the Compact, such that the election is of no consequence.[25]

The compact members clearly interpret their agreement to allow for these adjustments. And, as explained in detail below, that interpretation is appropriate in accordance with laws of statutory and contract construction. The Compact's own terms suggest that its members are accorded the flexibility to vary – directly or indirectly – from compact provisions. This result is consistent with the stated purposes of the Compact, among them promoting uniformity and preserving state sovereignty, including uniformity and sovereignty with respect to state policy choices such as factor weighting and elections. This interpretation and its result is also consistent with the conclusions reached by the United States Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978), and compact jurisprudence from other federal and state courts.

To the extent there may be limitations on the exercise of this flexibility, we ask the court to recognize that it is the members of the agreement themselves who make that evaluation. The touchstone is that, when viewed as a whole, a state's enactment remains substantially supportive of the Compact's purposes. Ensuring that the purposes are met ensures that the benefits other members expected when entering the Compact will continue to be received. And, in the case of California's 1993 legislation, the members have long indicated by their course of performance that the Compact's purposes continue to be met, and their expected benefits continue to be received.

[25] Alaska, D.C., Hawaii, Kansas, Montana, New Mexico, North Dakota; *supra,* fn.17.

ARGUMENT

1. The Compact Affords its Member States the Flexibility to Adopt Apportionment Formulae that Vary From its Terms.

In joining the Compact, the members did not surrender any aspect of state sovereignty to tax. Indeed, that was one of the primary reasons the United States Supreme Court ruled that the Compact did not require Congressional approval under the Compact Clause.

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission.

U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452, 473 (1978). In construing the members' powers under the terms of the Compact, it is thus important to keep in mind that the members exercise sovereign control over their tax laws and exercise their powers precisely as they would in the Compact's absence.

A statutory interpretation of the Compact's terms begins in the same way interpretation of any other statute begins: with its plain meaning.[26] Importantly, the language contains no prohibition against members' varying from the model Compact's provisions. Rather, the plain meaning of the Suggested Enabling Act's introduction, the

[26] "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." *Green v. State of California*, 42 Cal.4th 254, 260, 64 Cal. Rptr.3d 390, 165 P. 3d 118 (2007); *see also Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 567, 67 Cal.Rptr. 3d 468, 169 P.3d 889 (2007).

Suggested Enabling Act, and the Compact itself, all support the ability of Compact members to exercise some degree of flexibility in the enactment of its provisions.[27]

The Suggested Enabling Act's introduction clearly indicates that the Compact was not designed to lock its members into a system where no one member could make changes without all members doing the same. The introduction states, "[t[he Multistate Tax Compact is a model law. ... [It] is not truly a Compact in that actions taken under its authority have only an advisory and/or recommendatory effect on its member states."[28]

Section 1 of the Suggested Enabling Act, as well as the same section of the California Enabling Act,[29] contains ample evidence of this flexibility by declaring that "[t]he 'Multistate Tax Compact' is hereby enacted into law and entered into with all jurisdictions legally joining therein, in the form *substantially* as follows ..." [emphasis added]. By their own terms, neither the Suggested Enabling Act nor California's adopted Enabling Act require member states to enact the model Compact verbatim. And many

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[27] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited November 8, 2011). The use of the term "suggested" in the title supports the Commission's position that the compact does not require its members to act in lockstep.

[28] Taxpayers attempt to limit this language to the associate members of the Commission. Appellants' Reply Brief at 16 – 17. Such an interpretation is nonsensical. The "model Compact" is the version developed by the drafters as a model for states that wish to join the Compact by enacting it "in substantially similar form." (Enabling Act, § 1) The associate members, by definition, have not enacted any version of the model Compact.

[29] Calif. Rev. & Tax. Code §38001.

compact members have indeed varied – directly or indirectly – from the model Compact's provisions.[30]

As Article I.2 of both the model Compact and the enacted California compact statute recognize, the Compact is designed "to *promote* uniformity *or compatibility*" in tax systems (emphasis added).[31] "Promote" is defined as "to forward; to advance; to contribute to the growth, enlargement, or excellence of."[32] Enactment, by itself, is not expected to *achieve* uniformity in any particular component of tax systems, including uniformity in apportionment formulae or elections among the member states. Rather, enactment is intended to create the forum by which members may work to advance the growth and enlargement of uniformity or compatibility in their tax systems.[33]

Additional evidence that the compact anticipates some variation among its members is found in Art. VII.1, which provides;

> Whenever any two or more party States or subdivisions of party States have *uniform or similar* provisions of law relating to an income tax ... the Commission may adopt uniform regulations *for any phase* of tax

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[30] Respondent's Brief at 19-24.

[31] Calif. Rev. & Tax. Code § 38006, I.2

[32] Webster's New Universal Unabridged Dictionary, Deluxe 2d Edition.

[33] Pursuant to the provisions of Articles VI.3(b) and VII of the compact, the Commission works to advance uniformity through the ongoing work of its Uniformity Committee. The two subcommittees of the Uniformity Committee – one for corporate income tax and the other for sales and use tax – continuously work to draft model uniform statutes and regulations for the states to consider. The MTC model statutes and regulations are advisory only. Articles VI.3(b) and VII. They provide a framework for the member states to design their tax systems with a view to making them more uniform. For a compilation of the Commission's completed uniformity projects, see http://www.mtc.gov/Uniformity.aspx?id=524.

> administration of such law... The Commission may also act with respect to the provisions of Article IV of this compact. [Emphasis added.]

Art. VII.1 authorizes the Commission to initiate a uniformity project when two or more party States have *similar* provisions of law regarding *any phase* of tax administration, and permits it to act with respect to the provisions of Article IV of the Compact. Article VII.1 is not limited to instances in which the Compact provisions are uniform. It expressly contemplates invoking the uniformity process when states have apportionment formulae that are similar to, but not necessarily uniform with, that contained in Article IV. Article VII.1 contemplates situations where state enactments of certain compact provisions will be similar to, but not identical with, the provisions of the model Compact. Thus Article VII.1 also indicates that some variation from the model Compact is anticipated.

The model Compact's severability provision in Article XII also demonstrates the value placed on inclusiveness over standardization.[34] Article XII provides:

> If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States *and in full force and effect as to the State affected as to all severable matters.* [emphasis added.]

Under this severability provision, the Compact continues in full force in a particular member state even if some of its provisions are found to be unconstitutional in that state. A legislature's decision to include such a clause in a statute is evidence of the legislature's intent that the remaining portions of the statute should stand if the court declares some of its provisions to be unconstitutional or otherwise invalid. The inclusion

[34] Calif. Rev. & Tax. Code § 38006, XII.

of a severability clause in the model Compact indicates the intent that a member state remain a compact member even if its Compact provisions ultimately vary from the model Compact. If the intent were otherwise, a severability clause would not have been included. If any one compact provision were truly critical, the model Compact may well have included a *nonseverability* clause instead.

Given that Article XII of the model Compact requires it to be "liberally construed so as to effectuate [its] purposes," the inherent flexibility suggested by its plain meaning should be given weight, and it should not be construed in a rigid or frozen manner. If the only options available to a state that needs to depart from the Compact's equally weighted apportionment formula are to withdraw, acquiesce in a provision that is contrary to the state's needs, or convince every other state – including states whose needs may be quite different – to amend their enacted versions of the Compact, the Compact could not long endure and its purposes would be entirely frustrated. The Compact does not require such a draconian set of choices.

2. The Compact Members Have Indicated by Their Course of Performance that California's 1993 Legislation is Fully Consistent with the Flexibility Inherent in the Compact and the Promotion of the Compact's Purposes.

As far back as the early 1800's, the United States Supreme Court expressly recognized that compacts, even though statutory, are also contractual in nature, stating "... the terms 'compact' and 'contract' are synonymous." *Green v. Biddle*, 8 Wheat. 1, 40 (1823). Thus, in addition to general principles of statutory construction, substantive contract law applies in the interpretation of a compact:

> When adopted by a state, the compact is not only an agreement between the state and other states that have adopted it, but it becomes the law of those states as well, and must be interpreted as both contracts between states and statutes within those states. 1 A Sutherland, *Statutes and Statutory Construction* §32.5.

Where the issue is the proper interpretation of an interstate compact – an interstate contract – the governing law is state contract law.

Most relevant to this case is the basic premise of contract law that "the parties [to the contract] themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was".[35] Section 2-208 of the Uniform Commercial Code extends this approach by making *course of performance* relevant to determine the meaning of the contract even where the contract's express terms seems clear on their face.[36] In interpreting the obligations of the parties to a compact, courts have long recognized that, as for contracts generally, the actual performance of a compact by the parties has high probative value in determining the scope of those obligations:

> In determining [the meaning of a compact] the parties' course of performance under the Compact is highly significant.

Alabama v. North Carolina, 130 S.Ct. 2295, 2309 (2010).

The course of performance doctrine has two material elements, both of which have been satisfied in this case. According to Cal. Comm. Code §1303(a);

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[35] U.C.C. §2-208 cmt. 1 Section 2-208 of the U.C.C. is codified, without substantive change, at Cal. Comm. Code §1303(a).

[36] 1 Hawkland, Uniform Commercial Code ¶2-208:1 (2001).

A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

Ten Compact members – parties to the contract – have, like California, varied from Articles III.1 and IV by enacting mandatory apportionment formulae other than the Article IV equal-weighted formula.[37] As these enactments are a matter of public record, having been adopted by statute, the other parties to the contract are charged with knowledge of each of these ten occasions.

The Compact member states have had numerous opportunities to object to the adoption of a varying apportionment formula by any or all of the ten states, and have declined to do so. Pursuant to Commission bylaw 6, the Executive Committee of the Commission meets periodically throughout the year.[38] In addition, the Commission itself meets at least once a year.[39] Therefore, the parties to the Compact have had repeated opportunities to object to the adoption by any or all of the ten states of an apportionment formula that precludes a taxpayer from exercising the Article III.1 election. No member state has ever raised such an objection. Indeed, compact members have *supported*

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[37] *Supra,* fn. 20. Note that several compact members have also departed from the apportionment provisions of Article IV in ways other than by adopting an apportionment formula that emphasizes sales. Respondent's Brief at 19-24.

[38] Commission bylaw 6 is available at http://www.mtc.gov/About.aspx?id=2232.

[39] Compact, Article VI.1 (e).

California's compact membership by repeatedly electing its representatives to serve as Commission officers and chairs of Commission committees notwithstanding California's 1993 adoption of mandatory double-weighted apportionment.[40]

Thus, compact members' course of performance strongly supports an interpretation of the Compact as sufficiently flexible to recognize California's 1993 legislation as fully consistent with the purposes of the Compact. In contract terms, the promotion of the Compact's purposes is analogous to the benefit the parties expected to receive upon joining the agreement. Many benefits can be expected from the continued participation of a large and influential state such as California. Every additional state enactment of the Compact enlarges the membership of the Commission, broadens the Commission's base with the addition of the views of that state's tax administrator to its deliberations, and increases the weight of the results of those deliberations in the courts and in the Congress. These and other benefits of membership would be frustrated by a rigid and inflexible interpretation of the Compact.

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[40] *E.g.,* Kristine Cazadd, Interim Executive Director of the California State Board of Equalization was elected to serve on the Commission's Executive Committee for FY 2011-2012 (http://www.mtc.gov/About.aspx?id=74); Selvi Stanislaus, Executive Director, California FTB, was elected to the Commission's Executive Committee for FY 2007-2008 (MTC Annual Report FY 2006-2007, p. 5, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/AR_FY06_07.pdf); Will Bush, California FTB was elected to serve on the Commission's Executive Committee in FY 2005-2006 and FY 2006-2007 (MTC Annual Report FY 2004-2005, p.5 http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY04_05.pdf and MTC Annual Report FY 2005-2006, p.4 http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/AR_FY05_06.pdf).

Taxpayers' argument that members cannot vary from the model Compact derives from compact cases that are not germane to the Multistate Tax Compact. Appellants' Opening Brief at pp. 22-30. First, many of the cases on which taxpayers rely concern congressionally approved compacts. Because a congressionally approved compact is federal law, no state can alter its terms without congressional approval.[41] The Multistate Tax Compact does not require, and has not received, congressional approval. It is therefore not subject to these limitations.[42] Even more fundamentally, the cases which hold that the compacts at issue could not be unilaterally altered, including compacts that do not require federal approval, turned on the fact that the parties to those compacts undertook mutual obligations to each other that were *critical* for the proper function of the compact across state lines. The Port Authority of New York and New Jersey, for example, simply could not maintain bridges and tunnels that connect those two states if one state could unilaterally decide that it will change the rules by which the bridges and tunnels operate. The compact creating the Port Authority, therefore, specifically requires the legislatures of both states to concur in or authorize rules and regulations promulgated by the Port Authority for the improvement of the conduct of navigation and commerce for those rules and regulations to be binding and effective upon all persons affected thereby.[43] Similarly, interstate compacts that provide for the supervision of parolees or

[41] *Cuyler v. Adams,* 443 U.S. 433, 440 (1981).

[42] *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978).

[43] N.J.S.A. 32:1-19.

the placement of children across state lines cannot function if one state could unilaterally change the terms under which it will perform its compact obligations.[44] In contrast, the Multistate Tax Compact allows each member to fully exercise its sovereign power to tax independent of any requirement of concurrence by the other members and with no delegation of power to the Commission to bind the members.[45] The United States Supreme Court has recognized that the rights and obligations of state tax law apply entirely within the jurisdiction of the taxing state, irrespective of the taxpayer's obligations in another.[46] No compact member state has a reliance interest in another state's retaining the Article IV mandatory apportionment formula, which in no way impacts the function of the Compact in another state.

CONCLUSION

A proper interpretation of the compact, in accordance with laws of statutory and contract construction, indicates member states are accorded flexibility to vary – directly or indirectly – from the model Compact's terms, including Articles III.1 and IV. Ultimately, it is for the parties to the Compact to judge whether its members have exercised the flexibility granted by the Compact in ways that further its objectives. The parties to the Compact have demonstrated throughout their repeated course of

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[44] *McComb v. Wambaugh,* 934 F. 2d 474 (3d Cir. 1991), *Doe v. Ward,* 124 F. Supp. 2d 900 (WD Pa. 2000).

[45] *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 473 (1978).

[46] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

performance that the adoption of California's mandatory apportionment formula other than the UDITPA formula that supersedes the Article III election is not an impermissible alteration or amendment of the Compact. The Commission respectfully requests this Court sustain the authority of the members of the Compact to determine its meaning and sustain California's adoption of its apportionment formula as fully consistent with the Compact.

Respectfully submitted this 14th day of November, 2011.

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Attachment

STATE APPORTIONMENT OF CORPORATE INCOME

(Formulas for tax year 2011 – as of January 1, 2011)

ALABAMA *	3 Factor	NEBRASKA	Sales
ALASKA*	3 Factor	NEVADA	No State Income Tax
ARIZONA *	Double wtd Sales/80% Sales, 10% Property & 10% Payroll	NEW HAMPSHIRE	Double wtd Sales
		NEW JERSEY	Double wtd Sales
ARKANSAS *	Double wtd Sales	NEW MEXICO *	3 Factor/Double wtd. Sales
CALIFORNIA *	Sales/Double wtd Sales (1)	NEW YORK	Sales
COLORADO *	Sales	NORTH CAROLINA *	Double wtd Sales
CONNECTICUT	Double wtd Sales/Sales	NORTH DAKOTA *	3 Factor
DELAWARE	3 Factor	OHIO	Triple Weighted Sales (4)
FLORIDA	Double wtd Sales	OKLAHOMA	3 Factor
GEORGIA	Sales	OREGON	Sales
HAWAII *	3 Factor	PENNSYLVANIA	90% Sales, 5% Property & 5% Payroll
IDAHO *	Double wtd Sales		
ILLINOIS *	Sales	RHODE ISLAND	3 Factor
INDIANA	Sales	SOUTH CAROLINA	Double wtd Sales/Sales (5)
IOWA	Sales	SOUTH DAKOTA	No State Income Tax
KANSAS *	3 Factor/Sales	TENNESSEE	Double wtd Sales
KENTUCKY *	Double wtd Sales	TEXAS	Sales
LOUISIANA	Sales	UTAH	3 Factor/Double wtd Sales
MAINE *	Sales	VERMONT	Double wtd Sales
MARYLAND	Sales/Double wtd Sales	VIRGINIA	Double wtd Sales
MASSACHUSETTS	Double wtd Sales	WASHINGTON	No State Income Tax
MICHIGAN	Sales	WEST VIRGINIA *	Double wtd Sales
MINNESOTA	90% Sales, 5% Property, & 5% Payroll (2)	WISCONSIN *	Sales
		WYOMING	No State Income Tax
MISSISSIPPI	Sales/Other (3)	DIST. OF COLUMBIA	3 Factor
MISSOURI *	3 Factor/Sales		
MONTANA *	3 Factor		

Source: Compiled by FTA from state sources.

Notes:
The formulas listed are for general manufacturing businesses. Some industries have a special formula different from the one shown.
* State has adopted substantial portions of the UDITPA (Uniform Division of Income Tax Purposes Act).
Slash (/) separating two formulas indicates taxpayer option or specified by state rules.
3 Factor = sales, property, and payroll equally weighted.
Double wtd Sales = 3 factors with sales double-weighted
Sales = single sales factor

(1) Beginning with the 2011 tax year, California taxpayers may elect to use a single sales factor.
(2) Minnesota is phasing in a single sales factor which will reach 100% in 2014.
(3) Mississippi provides different apportionment formulas based on specific type of business. A single sales factor formula is required if no specific business formula is specified.
(4) Formula for franchise tax shown. Department publishes specific rules for situs of receipts under the CAT tax.
(5) Taxpayers are allowed only 80% of the reduced taxes from a single sales factor.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court (14)(c)(1), I hereby certify that this Amicus Curiae brief is in 13-point type and, according to the word count of the computer program used to prepare this brief, contains 5,438 words (including footnotes).

Dated: November 14, 2011

Sheldon Laskin
Attorney for *Amicus Curiae*
Multistate Tax Commission

PROOF OF SERVICE BY MAIL

(CCP 1013a, 2015.5)

I am employed by the Multistate Tax Commission, whose address is 444 North Capitol Street, N.W., Suite 425, Washington, D.C. 20001-1538. I am over the age of eighteen years and not a party to the within cause.

On November 14, 2011, I served a true copy of:

BRIEF OF THE MULTISTATE TAX COMMISSION AS *AMICUS CURIAE*

IN SUPPORT OF DEFENDANT AND RESPONDENT

on the following by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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_____

Sheldon H. Laskin

(5)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - DETROIT

In re:

Greektown Holdings, L.L.C., et al.,

Reorganized Debtors.

Case No. 08-53104
Chapter 11
Hon. Walter Shapero

_____/

OPINION DECLARING TAX EFFECTS OF PLAN PURSUANT TO 11 U.S.C. § 1146(b)

I. INTRODUCTION

The matter before the Court is Reorganized Greektown Holdings, L.L.C.'s Motion for an Order and Judgment Declaring Tax Effects of the Plan pursuant to 11 U.S.C. § 1146(b) (Docket No. 2795) (the "Motion"). In the Motion, Greektown Holdings L.L.C. ("Greektown") requests that the Court enter an order and judgment declaring that (1) 98.5938% of Greektown's cancellation of indebtedness income ("COD Income") is not subject to the Michigan Business Tax ("MBT") or any component thereof, and (2) Greektown's basis in assets, net operating losses, or any other tax attributes will not be reduced for MBT purposes due to the fact that all or substantially all of Greektown's COD Income is not subject to MBT. The State of Michigan Department of Treasury ("Department of Treasury") filed an Objection to the Motion (Docket No. 2878), requesting that the Court deny it and enter an order and judgment declaring that (a) Greektown's COD income is subject to the MBT "gross receipts" tax component of the MBT, (b) Greektown's basis in assets, net operating losses, or any other tax attributes will be reduced for MBT purposes under the "business income" component as authorized by 11 U.S.C. § 346(j)(2). In the alternative, the Department of Treasury argues that the Court should abstain from deciding this issue. The Court held a hearing and took the matter under advisement.

II. BACKGROUND AND FACTS

On May 29, 2008, the Debtors each filed voluntary petitions under Chapter 11 of the Bankruptcy Code. On June 13, 2008, the Bankruptcy Court entered an order under Bankruptcy Rule 1015(b) jointly administering the Chapter 11 cases under the lead case, Greektown Holdings, L.L.C., Case No. 08-53104.

On December 7, 2009, the Noteholder Plan Proponents filed the Plan. On January 22, 2010, the Bankruptcy Court entered an Order Confirming the Plan (Docket No. 2046) (the "Confirmation Order"), and the effective date of the Plan was June 30, 2010. The Plan provided that all debt not paid would be discharged. Greektown's financial statements indicate that it will have approximately $120,000,000 in cancellation of indebtedness ("COD").

Under the Plan, the ownership interests in Greektown Holdings held by its former members were extinguished and Greektown Superholdings, Inc. and Greektown Newco Sub, Inc. (new entities formed pursuant to the Plan) became the sole members of Greektown Holdings. The former members of Greektown Holdings, whose membership interests were extinguished upon consummation of the Plan, were Monroe Partners, L.L.C. ("Monroe") and Kewadin Greektown Casino, L.L.C. ("Kewadin"). Monroe and Kewadin each held a 50% membership interest in Greektown Holdings. Kewadin is a limited liability company whose sole member is a tribal authority established by the Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe"). Monroe is a limited liability company. 97.1875% of membership interests in Monroe are owned by Kewadin and the remaining 2.8125% are owned by several individuals.

On May 28, 2010, Greektown and the Noteholder Plan Proponents filed a Motion for Order Authorizing Noteholder Plan Proponents and/or Reorganized Greektown to Request Determination by State of Michigan Department of Treasury of Tax Effects of Plan (Docket No. 2467) ("Initial Tax Motion"). On June 17, 2010, the Court granted the Initial Tax Motion and

authorized Greektown and the Noteholder Plan Proponents to request a legal determination from the Department of Treasury concerning the tax effects of the Plan under 11 U.S.C. § 346 and the Michigan Business Tax Act, MCL 208.1101 *et seq.* (Docket No. 2513). That Order provided, in part: "In the event of an actual controversy, any of the Noteholder Plan Proponents and/or Reorganized Greektown . . . shall be authorized to seek any appropriate additional relief as to the matters set forth herein, including a declaration by this Court of such tax effects; and [t]he Court shall retain jurisdiction to hear and determine all matters arising from or related to the foregoing and the implementation of this Order."

On August 10, 2010, Greektown formally requested technical advice from the Department of Treasury, seeking confirmation of its position that (1) its COD income in bankruptcy "is not subject to MBT or any component thereof", and (2) its "basis in its assets, net operating losses or any other tax attributes will not be reduced, for MBT purposes, on account of the fact that [Greektown] Holdings' COD [income] in bankruptcy is not subject to MBT." In a letter opinion dated September 28, 2010, the Department of Treasury determined that the exclusion of COD income from state taxation set forth in 11 U.S.C. § 346(j)(1) applied to the Business Income Tax ("BIT"), as a "tax on or measured by income," but not the Modified Gross Receipts Tax ("MGRT"). According to the Department of Treasury, the MGRT is not a "tax on or measured by income," despite the "fact that certain deductions and exclusions from gross receipts are permitted in calculating" the tax base. The Department of Treasury based its decision on the fact that the BIT and the MGRT are "calculated differently, and the tax bases are imposed at wholly different rates," and because the MBT provides that the MGRT's purpose is the impose a tax "upon the privilege of doing business and not upon income or property." With respect to the question concerning Greektown's tax attributes, the Department of Treasury

concluded that, although 11 U.S.C. § 346(j)(2) does "not mandate" a reduction of Greektown Holdings' tax attributes, that section "should be read to permit, and not prohibit, a reduction in a debtor's tax attributes under the applicable state law where the debtor is able to exclude COD income for some reason other than the applicability of Section 108(a)."

After receiving the Department of Treasury's decision, Greektown filed its Motion for an Order and Judgment Declaring Tax Effects of the Plan pursuant to 11 U.S.C. § 1146(b) (Docket No. 2795) in this Court. The State of Michigan Department of Treasury ("Department of Treasury") filed an Objection to Greektown's Motion (Docket No. 2878).

III. DISCUSSION

A. Abstention Pursuant to 28 U.S.C. § 1334(c)(1)

The Department of Treasury has asked this Court to abstain from hearing this matter under 28 U.S.C. § 1334(c)(1). In determining whether to abstain under § 1334(c)(1), the Court must analyze whether "the interest of justice, or in the interest of comity with the State courts or respect for State law" support abstention. Courts have listed the following non-exclusive factors as relevant:

> (1) the effect or lack of effect on the efficient administration of the estate if a court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of this court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of nondebtor parties; and (13) any usual or other significant factors.

Kmart Creditor Trust v. Conway (In re Kmart Corp.), 307 B.R. 586, 596-97 (Bankr. E.D. Mich. 2004) (J. McIvor) (citations omitted).

Dealing specifically with the relevant noted factors: (1) efficient administration of the bankruptcy estate will not be affected by abstention because this matter does not appear to affect any of the other matters at issue pending in the bankruptcy case; (2) both state law and bankruptcy law are involved, but the ultimate issues in this matter relate to the interpretation of what is considered a "tax on or measured by income" under 11 U.S.C. § 346(j)(1), an issue that is predominately a bankruptcy law issue; (3) although there is some difficult or unsettled state tax law involved, the Court believes that the issue here is not truly an interpretation of state law, but, as noted, rather an interpretation of § 346(j)(1) of the Bankruptcy Code; (4) there is no related proceeding commenced in the state court or any other non-bankruptcy court, so this factor is not relevant; (5) this Court has jurisdiction over this case, not only under 28 U.S.C. § 1334, but also under the confirmed Plan; (6) and (7) neither are particularly relevant in this situation; (8) it is "feasible" to sever the claims in the sense that it is possible to have the state court determine whether the COD income is taxable under state law, but the ultimate issue as stated involves an interpretation of § 346(j)(1), which is uniquely a bankruptcy issue; (9) while this Court's docket is heavy, there is nothing in the record which indicates that it could not efficiently dispose of the issues, albeit not in as timely a fashion as it would have liked to do; (10) there is a likelihood that this motion being filed in the Bankruptcy Court was in an effort to achieve a result different than the one given in the letter opinion issued by the Department of Treasury, but at bottom the issue is one under § 346(j)(1) and thus the bankruptcy Court is arguably better situated to decide it, and in any event, this factor, if it favors the objecting party, must be weighed against all of the other relevant factors; (11) a jury trial is not involved, so this

factor is not relevant; (12) there are "non-debtor" parties present in the bankruptcy case and this Court has an extensive history with this case and knowledge regarding the interests of the "non-debtor" parties; and (13) there are no unusual or other significant factors.

On balance, therefore, the factors do not favor abstention, and accordingly, the Department of Treasury's Motion for Abstention is denied.

B. Whether the Modified Gross Receipts Tax Constitutes a Tax "On or Measured By Income" under 11 U.S.C. § 346(j)

In the Motion, Greektown argues that the Modified Gross Receipts Tax ("MGRT") constitutes a tax "on or measured by income" under § 346(j)(1).

Section 1146(b) states:

> The Court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local government unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects under section 346 of this title and under the law imposing such tax, of the plan.

As noted, after Greektown formally requested technical advice from the Department of Treasury as provided for under § 1146(b), that Department found that the Modified Gross Receipts Tax is not a "tax on or measured by income," despite the "fact that certain deductions and exclusions from gross receipts are permitted in calculating" the tax base. While Greektown presumably could have appealed that decision, it chose to file the Motion.

11 U.S.C. § 346(j)(1) provides: "For purposes of any State or local law imposing a tax on or measured by income, income is not realized by the estate, the debtor, or a successor to the debtor by reason of discharge of indebtedness in a case under this title, except to the extent, if any, that such income is subject to tax under the Internal Revenue Code of 1986." It is undisputed that the term "tax on or measured by income" has been interpreted to encompass a

broader category of items or taxes than an "income tax." *In re Williams*, 173 B.R. 459, 463 (Bankr. E.D. N.Y. 1994) (explaining that Section 507(a)(7)(A) "covers *all taxes on or measured by income*, not just 'income taxes' which would encompass a more narrow group.") (emphasis in original).

The Michigan Business Tax Act ("MBTA") is a relatively new tax act that replaced the Single Business Tax Act, which had been in existence since the mid-1970s. The MBTA has four tax liability components: (1) a business income tax component ("BIT") (MCL § 208.1201(1)), (2) a modified gross receipts tax component ("MGRT") (MCL § 208.1203(1)), (3) a surcharge component that is inapplicable here (MCL § 208.1117(5)), and (4) specific taxes for insurance and finance entities, also inapplicable here (MCL § 208.1113(3)). It is undisputed that the BIT component is a tax "on or measured by income" for purposes of § 346(j)(1). The parties strongly disagree, however, regarding whether or not the MGRT should be characterized as a tax "on or measured by income" for purposes of § 346(j)(1). The issue here essentially boils down to whether the nature and effect of the deductions permitted under the MGRT so as to make the MGRT fall outside of the realm of a gross receipts tax and into the realm of a tax "on or measured by income." In order to decide that issue, it is necessary to first evaluate the structure of the MBT, and more specifically, the MGRT.

The business income component of the MBTA starts with federal taxable income from business activity. *See* MCL § 208.1201, providing for the levy on the business income tax base; MCL § 208.1105(2), defining "business income" to mean that part of federal taxable income derived from business activity; MCL § 208.1109(3), defining "federal taxable income" as taxable income set forth in 26 U.S.C. § 63 of the Internal Revenue Code.

The MGRT component of the MBTA starts with a base of "gross receipts," which is defined broadly as the entire amount received by the taxpayer from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others. MCL § 208.1111(1). The amounts excluded from that definition include amounts received in any agency capacity for a principal for any of several purposes; proceeds less gain from disposition of certain property to the extent gain was included in federal taxable income; insurance proceeds, and proceeds from certain types of transactions characterized as loans involving automobile manufacturers, other types of manufacturers, and mortgage companies. MCL § 208.1111.

The base upon which the MGRT is imposed is "a taxpayer's gross receipts . . . less purchases from other firms." *See* MCL § 208.1203(3). A taxpayer calculating the MGRT base would start with Part 5 of the Michigan Worksheet 4700 to first calculate their "gross receipts" for purposes of the Michigan Business Tax Annual Return. From there, Worksheet 4700 provides for the deduction of "refunds from returned merchandise," "cash and in-kind discounts," and "trade discounts." Next, Worksheet 4700 provides for a phased-in deduction for amounts deducted as bad debts for federal income tax purposes that correspond to items of gross receipts included in the modified gross receipts tax base on line 73 thereof. The amount that could be deducted is 50% in 2008, 60% in 2009 and 2010, and 75% in 2011, and 100% in 2012 and thereafter. Other than those specific deductions, Worksheet 4700 also provides for many other deductions.[1]

[1] These deductions include, but are not limited to: (2) Interest and dividends derived from obligations or securities of the United States government, the state of Michigan, or any governmental unit of the state of Michigan; (2) Proceeds from an insurance policy, a settlement of claim, or a judgment in a civil action, less any proceeds that are includable in "federal taxable income" (as defined for MBT purposes); (3) Sales or use taxes collected from or reimbursed by a consumer or other taxes collected from or reimbursed by a purchaser and remitted to a local, state, or federal tax authority; (4) Amounts excluded from gross income of a foreign corporation engaged in the international operation of aircraft under IRC Section 883(a); (5) federal, state, and local tax refunds; (6) proceeds from the original issue of

At the end of Worksheet 4700, the taxpayer will have arrived at a number that constitutes "gross receipts" for MBT purposes, which is then carried over to the applicable line of the MBT Annual Return as gross receipts – the starting point of calculating the MGRT base on that form. Once a taxpayer arrives at "gross receipts," additional subtractions are provided on the MBT Annual Return, which spells out the numerous items that are included in the deduction for "purchases from other firms."

The first set of deductions is for (i) "inventory acquired during the tax year", (ii) "depreciable assets acquired during the tax year", (iii) "materials and supplies not included in inventory or depreciable property." Those deductions, among others, are all included in the definition of "purchases from other firms." *See* MCL § 208.1203(6). Next, the MBT provides for a deduction for "depreciable assets acquired during the tax year." Finally, the MBT provides for deductions of wages in certain cases, including "the actual cost of wages and salaries, benefits, worker's compensation, payroll taxes, withholding, or other assessments paid to or on behalf of a covered employee by the professional employer organization under a professional employer arrangement"; the compensation of personnel supplied to a "staffing company's" customers, including payroll tax and worker's compensation costs; and "payments made by taxpayers licensed under Article 25 or Article 26 of the Occupational Code to independent contractors licensed under Article 25 or 26." Those deductions are only a portion of the total deductions allowed in calculating the MGRT base.

Michigan courts, it would appear, have yet to weigh in on the character of the MGRT. MCL 208.1203(2) states that the MGRT is "tax levied and imposed . . . upon the privilege of doing business and not upon income or property." The Department of Treasury asks the court to

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debt instruments; and (7) proceeds from original issue of stock or equity instruments, or equity issued by a regulated investment company as defined in IRC Section 851.

strictly construe this language and hold that the MGRT tax is a tax on gross receipts and not a tax "on or measured by income."

Although the language of MCL 208.1203(2) states that the MGRT is not a tax on income, this Court finds that the MGRT is a tax "measured by income" as contemplated by 11 U.S.C. § 346(j)(1). Although the calculation of MGRT starts out with "gross receipts", the varied and many deductions, credits, and exemptions available to taxpayers in calculating the MGRT base push the MGRT into the realm of a tax "measured by income." Section 346(j)(1) covers all taxes on or measured by income, not just "income taxes" which would encompass a more narrow group. *See In re Williams*, 173 B.R. 459, 463 (Bankr. E.D. N.Y. 1994). The Court wants to be clear that, although it holds that the MGRT is a tax "measured by income" for purposes of §346(j)(1), it is not holding that the MGRT is an income tax. The Michigan legislature clearly intended that the MGRT portion of the MBT would not be an income tax. However, the fact that the MGRT is a gross receipts tax does not exclude the possibility that it is a tax "measured by income" for the limited purposes set forth in § 346(j)(1).

The Department of Treasury relies heavily on *In re Raiman*, 172 B.R. 933 (9th Cir. B.A.P. 1994). In *Raiman*, the issue addressed by the court was whether a California tax statute on which assessments were based constituted a tax on or measured by income or gross receipts pursuant to 11 U.S.C. § 507(a)(7)(A). *Raiman*, 172 B.R. at 936. The *Raiman* court considered whether a tax on or measured by gross receipts "must be one which is measured by all receipts received by a taxpayer, without any items or transactions excluded." *Id.* at 937. That court relied heavily on the fact that the California tax allowed for exclusions, but no deductions. *Id.* at 938-39. The court explained that deductions "are wholly different than" exclusions because "[d]eductions represent costs incurred by all business" whereas "[e]xclusions are items that a

legislative body as a matter of policy has determined should not be included in gross receipts." *Id.* The court ultimately held that the California tax was a tax on or measured by gross receipts, despite the fact that it allowed for some exclusions.

Unlike the California tax in *Raiman*, which allowed only exclusions and no deductions, the MGRT allows both exclusions and deductions. Not only does the MGRT have deductions, those deductions are very similar to those permitted under the federal income tax. Moreover, those deductions are so numerous and varied as to make the MGRT fall within the realm of a tax "measured by income" under § 346(j)(1).

The Department of Treasury argues that the fact that sections of the Bankruptcy Code other than Section 346(j) refer to "taxes on or measured by income or gross receipts" (such as § 507(a)(7)(a), as was the section at issue in *Raiman*) militates toward a conclusion that Congress understood the distinction between the two very different types of taxes, and fully intended to include both kinds of taxes under the umbrella of creditor protection provided by § 507(a)(7), but chose to include a lesser universe of taxes for purposes of the exclusion available to debtors under § 346(j), as well as other sections of the Bankruptcy Code that are applicable to state laws imposing a tax "on or measured by income."

The Court disagrees with that argument. The MGRT is a tax "measured by income" for purposes of § 346(j)(1) because of the many deductions and exclusions it allows. The Michigan legislature clearly intended that the MGRT portion of the MBT would not be in income tax; however, as noted, the fact that the MGRT is a gross receipts tax does not exclude the possibility that it is a tax "measured by income" for the limited purposes set forth in § 346(j)(1).

Accordingly, this Court holds that the MGRT is a tax "measured by income" for purposes of § 346(j)(1), and therefore, Greektown's COD income is not subject to the MBT.

C. Whether the Department of Treasury has authority under 11 U.S.C. § 346(j)(2) to Reduce Greektown's Tax Attributes

11 U.S.C. § 346(j)(2) provides:

> Whenever the Internal Revenue Code of 1986 provides that the amount excluded from gross income in respect of the discharge of indebtedness in a case under this tittle shall be applied to reduce the tax attributes of the debtor or the estate, a similar reduction shall be made under any State or local law imposing a tax on or measured by income to the extent such State or local law recognizes such attributes. Such State or local law may also provide for the reduction of other attributes to the extent that the full amount of income from the discharge of indebtedness has not been applied.

The first sentence of § 346(j)(2) provides for reduction of tax attributes for State tax purposes where those tax attributes are identified in an applicable section of the Internal Revenue Code and the State or local law imposing a tax on or measured by income recognizes such attributes. That portion is inapplicable here because Greektown is a partnership whose tax attributes are not reduced for federal tax purposes. The second sentence of § 346(j)(2) provides that "State or local law **may also provide for** the reduction of **other attributes** to the extent that the full amount of income from the discharge of indebtedness has not been applied." 11 U.S.C. § 346(j)(2) (emphasis added).

Greektown argues that, since no Michigan statute provides for the reduction of tax attributes, the second sentence of § 346(j)(2) does not require or permit such a reduction. The Department of Treasury argues that, although there is no Michigan statute providing for the reduction of tax attributes, the Michigan Legislature recognized tax attributes set forth in various provisions of the IRC when drafting the MBT, and that recognition is sufficient to allow the State to reduce Greektown's tax attributes to the extent that the full amount of income from the discharge of indebtedness has not been applied.

The issue here is one of statutory construction. A court's analysis of a statute begins with the statutory language itself. It is a well-settled principle that, "unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language." *Caminetti v. United States,* 242 U.S. 470, 485, 37 S. Ct. 192, 61 L.Ed. 442 (1917). Two exceptions exist regarding the application of a statute's plain language. As to the first exception, the United States Supreme Court held, in the case of *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989), that "[t]he plain meaning of legislation should be conclusive, except in 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."

The second exception to the Plain Meaning Rule is triggered " 'when literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the general moral or common sense.'" *RCI Tech. Corp. v. Sunterra Corp.* (*In re Sunterra*), 361 F.3d 257, 265 (4th Cir.2004). As to both of these exceptions, the instances in which either should apply should be " 'exceptionally rare.' " *Id.* (quoting *Hillman,* 263 F.3d at 342). In *Sunterra,* the Court found that a literal reading of the statute would be consistent with the general bankruptcy policy constructed by Congress. In making the latter finding, the court explained that "if it is plausible that Congress intended the result compelled by the Plain Meaning Rule, we must reject an assertion that such an application is absurd. *Id.* at 268 (citing *Sigmon Coal Co. v. Apfel,* 226 F.3d 291, 304 (4th Cir.2000), *aff'd sub nom. Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 122 S. Ct. 941, 151 L.Ed.2d 908 (2002)).

The Court must presume every word in a statute to have meaning and effect must be given to all words in a statute "to avoid an interpretation which would render words superfluous or redundant." *Walker v. Bain,* 257 F.3d 660, 667 (6th Cir. 2001) (citing *Astoria Fed. Sav. &*

Loan Ass'n v. Solimino, 501 U.S. 104, 112, 111 S. Ct. 2166, 115 L.Ed.2d 96 (1991); *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998)).

Here, the statutory language of the second sentence of § 346(j)(2) is clear and unambiguous. When the language of the statute is considered, it is clear that a State or local law must "provide for" the reduction of "other attributes" in order for such attribute reduction to be permitted in the absence of an Internal Revenue Code requirement that the attributes be reduced. There is no Michigan or local law that provides for the reduction of "other attributes," and the fact that Michigan law recognizes tax attributes does not mean that it "provides for" their reduction. *See Rake v. Wade*, 508 U.S. 464, 473-74 (1993) ("provides for" is "most natural[ly] read and is "commonly understood" to mean "make a provision for"); *Lawson v. Kanawha County Court*, 92 S.E. 786, 789 (W. Va. 1917) ("The phrases, 'prescribed by law' and 'provided by law,' . . . generally mean prescribed or provided by statutes); *see also* Black's Law Dictionary at 1224 (6th ed. 1990) (defining "provided by law" as "prescribed or provided by some statute."). The State law simply has not provided for reduction of other attributes and thus, § 346 does not permit the Department of Treasury to reduce Greektown's tax attributes.

IV. CONCLUSION

For the reasons set forth herein, the Court concludes that (1) abstention is inappropriate in this case; (2) the MGRT is a tax "measured by income for purposes of § 346(j)(1), and therefore, Greektown's COD income is not subject to the MBT; and (3) Greektown's basis in assets, net operating losses, or any other tax attributes cannot be reduced for MBT purposes due to the fact that all or substantially all of Greektown's COD Income is not subject to MBT. Greektown shall prepare and present an appropriate order.

Signed on May 16, 2013

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge